Atrium at Princeton, LLC d/b/a Pavilions at Forrestal and Princeton Healthcare, LLC d/b/a Pavilions at Forrestal *and* SEIU 1199 New Jersey Health Care Union. Cases 22–CA–27066, 22–CA–27289, 22–CA–27315, and 22–CA–27601

December 5, 2008

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

DECISION AND ORDERS

On April 15, 2008, Administrative Law Judge Steven Davis issued the attached decision. The Respondents jointly filed exceptions and a supporting brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below and to adopt the recommended Order as modified and set forth in full below.[4]

1. We agree with the judge that Respondent Atrium violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union for a successor collective-bargaining agreement. We find it unnecessary to decide whether the parties had reached a genuine impasse in their negotiations, however, as any impasse that existed was broken in January 2006 when Respondent Atrium unilaterally implemented a new health insurance plan without providing the Union with notice and an opportunity to bargain and failed and refused to provide the Union with requested information concerning the new plan.

"An impasse does not destroy the collective-bargaining relationship. Instead, a genuine impasse merely suspends the duty to bargain over the subject matter of the impasse until changes in circumstances indicate that an agreement may be possible." *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996) (footnote omitted). Anything that creates a new possibility of fruitful discussion breaks an impasse and revives an employer's obligation to bargain over the subjects of the impasse. Id., citing *Gulf States Mfrs. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983).

By the Respondents' own admission, health benefits were a critical issue in the negotiations for a successor agreement. The Respondents have consistently main-

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondents also contend that the judge demonstrated bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit. Although the judge excerpted language from his decision in another case that involved some of the same issues and witnesses, he independently discussed and analyzed the evidence in this case and his findings and conclusions appear to be drawn exclusively from the record herein.

In affirming the judge's credibility findings, Chairman Schaumber does not rely on the judge's blanket statement, in the "Statement of the Case" section of his decision, that his findings of fact were based in part on his "observation of the demeanor of the witnesses." See then Member Schaumber's dissent in *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 421–422 (2004) (judge's blanket statement relying on observation of witness demeanor was insufficient to support credibility resolution absent an explanation of the demeanor-based indicia that influenced the judge). Rather, Chairman Schaumber notes that in making his credibility resolutions, the judge did not rely solely on his blanket "observation of the demeanor" statement, but rather analyzed and balanced the witnesses' testimony and gave other reasons for his credibility resolutions.

[3] In adopting the judge's finding that Respondent Princeton's August 24, 2005 letter to employees constituted unlawful direct dealing, Chairman Schaumber notes that the letter contained an important contractual term (12-percent wage increase) that the Respondent had not yet presented to the Union. The letter also falsely represented that the Union had rejected a proposal, which, in fact, it had never seen. Further, this direct communication with employees occurred in the context of a myriad of unfair labor practices. In similar circumstances, the Board has found direct dealing violations. See *Government Employees (IBPO)*, 327 NLRB 676 (1999), enfd. mem. 205 F.3d 1324 (2d Cir. 1999) (Board adopted judge's finding that employer engaged in unlawful direct dealing by presenting a wage proposal to employees before adequately presenting it to the union); *Detroit Edison Co.*, 310 NLRB 564, 565 (1993). Chairman Schaumber did not participate in those cases and does not view them as establishing a per se rule that any communication to employees of a contract proposal that has not yet been presented to a union constitutes unlawful direct dealing. However, he agrees that, under extant precedent, which he applies for institutional reasons, the judge did not err in finding a direct dealing violation on the specific facts of this case.

[4] We shall modify the judge's conclusions of law and remedy to clarify the violations found and to conform to the Board's standard remedial language. For the reasons explained below, we shall also substitute separate orders and notices for the common order and notice recommended by the judge.

tained that the Union's inflexibility on this issue contributed to a breakdown in negotiations. Under the expired agreement, Respondent Princeton was required to make monthly contributions to the 1199 SEIU Greater New York Benefit Fund (the benefit fund) in the amount of approximately 16 percent of gross payroll, excluding overtime. Throughout negotiations, the Union adhered to a proposal that required the Respondents' continued participation in the benefit fund at a significantly increased contribution rate, while the Respondents offered to continue participating at approximately the same rate as under the expired agreement. As of the final negotiating session on November 29, 2005, the parties remained far apart on this issue.

On December 1, 2005, the benefit fund terminated benefits for the Respondents' employees, after sending several letters advising Respondent Princeton that it was delinquent in its contributions and demanding payment. On about December 9, 2005, Respondent Atrium took over the operations and management of the facility from Respondent Princeton.[5] On an unspecified date in January 2006, Respondent Atrium unlawfully implemented a new health insurance plan without providing the Union with notice and an opportunity to bargain.

By letter dated January 19, 2006, the Union requested information and demanded bargaining concerning the new plan. The Union repeated its information request in letters of June 20, July 17, and November 13, 2006. In its November 13 letter, the Union stated that it needed the requested information in order to bargain effectively, and it reminded Respondent Atrium that "Health benefits are a significant issue in our negotiations and the Union has stated that we are open to considering health benefits other than those provided through the Greater New York Benefit Fund."

The cancellation of the existing health insurance plan and the necessity of obtaining alternate coverage changed the backdrop of negotiations and created the possibility of productive bargaining. Had Respondent Atrium provided the Union with notice and an opportunity to bargain prior to implementing the new health insurance plan and/or provided the requested information concerning plan benefits and costs, it may have led to informed bargaining and an earlier offer by the Union to consider alternate plans. By unlawfully denying the Union the opportunity to bargain over the new plan and to inspect records that could very well convince the Union to change its health benefits proposal, the Respondent artificially perpetuated deadlock. We therefore conclude that impasse, if any, no longer existed on January 19, 2006, when the Union requested information and demanded bargaining concerning the new plan. By ignoring the Union's numerous requests to resume negotiations on and after that date and by engaging in delaying tactics, Respondent Atrium failed to bargain in good faith with the Union for a successor collective-bargaining agreement in violation of Section 8(a)(5) and (1) of the Act.[6]

Because we agree with the judge that Respondent Atrium unlawfully failed to bargain in good faith for a successor agreement, we find it unnecessary to pass on his further finding that Respondent Princeton violated Section 8(a)(5) by the same or similar conduct. Respondent Princeton ceased operations at the facility involved in these proceedings on about December 9, 2005, and any additional violation based on Respondent Princeton's conduct would not affect the remedy.

2. In finding that Respondent Atrium violated Section 8(a)(5) by refusing to furnish requested information, the judge determined that all of the information the Union requested in its letters of January 19, June 20, and July 17, 2006, including the unit employees' social security numbers, was presumptively relevant. While we agree with the judge that the Union was entitled to receive the other requested information, the Board has held that social security numbers are not presumptively relevant and that the union must therefore demonstrate the relevance of such information. See *Bookbinder's Seafood House, Inc*., 341 NLRB 14, 15 fn. 1 (2004); *ABF Freight System, Inc*., 325 NLRB 546 (1998). We find that the Union has not demonstrated such relevance here. Accordingly, we shall not require Respondent Atrium to give the Union the employees' social security numbers.

3. The judge's recommended Order effectively requires Respondent Princeton and Respondent Atrium jointly and severally to remedy all of the unfair labor practices found. However, we discern no basis for imposing joint and several liability on the Respondents.

The General Counsel did not plead in his complaint that the Respondents are alter egos or joint employers, or that Respondent Atrium is liable to remedy Respon-

[5] The parties stipulated that Respondent Atrium is a legal successor to Respondent Princeton with an obligation to recognize and bargain with the Union.

[6] The Union offered to meet on all dates in February 2006, 5 dates in June 2006, 21 dates in July 2006, 1 date in August 2006, 2 weeks in December 2006, and 1 week in January 2007. The only date that was agreed to by Respondent Atrium was June 12, 2006, and the parties did not meet on that date due to an internal union election.

dent Princeton's unfair labor practices as a successor under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). Nor did the General Counsel advance those theories at trial. Further, as noted above, Respondent Princeton ceased operations at the Pavilions facility on December 9, 2005, and there is no evidence that it participated in the unfair labor practices committed by Respondent Atrium after that date. In these circumstances, we find that the imposition of joint and several liability is unwarranted. Accord: *Diamond Detective Agency,* 339 NLRB 443, 445 fn. 5 (2003) (Board reversed judge's recommendation that successor employer be required to remedy unfair labor practices of its predecessor, because complaint did not allege that successor employer was a *Golden State* successor and General Counsel never advanced that theory at trial); *Blu-Fountain Manor*, 270 NLRB 199 fn. 4 (1984), enfd. sub nom. *NLRB v. Jarm Enterprises, Inc.*, 785 F.2d 195 (7th Cir. 1986) (Board reversed judge's recommendation that predecessor employer be required to remedy successor's unfair labor practices, because there was no evidence that predecessor employer participated in the unfair labor practices).

Accordingly, we shall require the Respondents to remedy only the respective violations that they committed. In order to clarify the remedial obligations of the Respondents, we shall issue separate orders and notices.

AMENDED CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time certified nurses' assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

4. At all times material the Union has been the exclusive collective-bargaining representative of the employees in the above unit.

5. By bypassing the Union and dealing directly with unit employees regarding terms and conditions of employment, Respondent Princeton violated Section 8(a)(5) and (1) of the Act.

6. By engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates, and unreasonably failing and refusing to meet and bargain for a successor collective-bargaining agreement, Respondent Atrium failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees in violation of Section 8(a)(5) and (1).

7. By unilaterally changing the health insurance plan that covered the unit employees' health expenses without providing the Union with notice and an opportunity to bargain, Respondent Atrium violated Section 8(a)(5) and (1).

8. By unilaterally eliminating the Baylor Incentive Program without providing the Union with notice and an opportunity to bargain, Respondent Atrium violated Section 8(a)(5) and (1).

9. By unilaterally changing the access rights of union representatives to its facility without providing the Union with notice and an opportunity to bargain, Respondent Atrium violated Section 8(a)(5) and (1).

10. By failing and refusing to supply relevant and necessary information requested by the Union in letters of January 19, June 20, and July 17, 2006, Respondent Atrium violated Section 8(a)(5) and (1).

11. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Atrium violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet and bargain in good faith with the Union for a successor collective-bargaining agreement, we shall order the Respondent to do so on request, and, if an understanding is reached, to embody that understanding in a signed agreement.

Having found that Respondent Atrium violated Section 8(a)(5) and (1) by changing the health insurance plan that covered the unit employees' health expenses and by eliminating the Baylor Incentive Program, we shall order Respondent Atrium, if requested to do so by the Union, to rescind the unilateral changes and restore the Baylor Incentive Program and the previ-

ously existing health insurance plan.[7] To the extent that the unlawful unilateral changes have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as requiring or authorizing Respondent Atrium to rescind such improvements unless requested to do so by the Union. We shall further order Respondent Atrium to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of Respondent Atrium's implementation of new terms and conditions of employment in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent Atrium violated Section 8(a)(5) and (1) by changing the access rights of union representatives to its facility, without giving the Union notice and an opportunity to bargain, we shall order Respondent Atrium to rescind the unilateral change.

In addition, having found that Respondent Atrium violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union relevant and necessary information requested in its letters of January 19, June 20, and July 17, 2006, we shall order the Respondent to furnish the Union with the requested information, excluding employees' social security numbers.

Finally, because it appears that Respondent Princeton has ceased operations at the facility involved in these proceedings, we shall order Respondent Princeton to duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current and former employees employed by Respondent Princeton at that facility at any time since August 24, 2005.

ORDERS

A. The National Labor Relations Board orders that the Respondent, Princeton Healthcare LLC d/b/a Pavilions at Forrestal, Wayne, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing 1199 New Jersey Health Care Union and dealing directly with its employees represented by the Union with regard to wages, hours, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix A"[8] to all current and former employees who were employed by Respondent Princeton at the Pavilions facility at any time since August 24, 2005. The notices shall be mailed to the last known address of each of the employees after being signed by the authorized representative of Respondent Princeton.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, Atrium at Princeton, LLC d/b/a Pavilions at Forrestal, Wayne, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with SEIU 1199 New Jersey Health Care Union as the exclusive bargaining representative of the employees in the appropriate unit by engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates, and unreasonably failing and refusing to meet and bargain for a successor collective-bargaining agreement. The appropriate unit is:

> All full-time and part-time certified nurses' assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

(b) Unilaterally changing terms and conditions of employment or other mandatory subjects without pro-

[7] Respondent Atrium may litigate in compliance whether it would be impossible or unduly or unfairly burdensome to restore the prior health insurance coverage provided through the 1199 SEIU Greater New York Benefit Fund. See, e.g., *Laurel Baye Healthcare of Lake Lanier, LLC*, 352 NLRB No. 30, slip op. at 1 fn. 3 (2008). If the Union chooses continuation of the unilaterally implemented health insurance plan, then make-whole relief for the unilateral change is inapplicable. See id. (citing *Brooklyn Hospital Center*, 344 NLRB 404 (2005)). Although Member Liebman dissented on that point in *Brooklyn Hospital Center*, supra at fn. 3, she recognizes that it is extant Board law and, for that reason alone, applies it here.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

viding the Union with notice and an opportunity to bargain.

(c) Failing to provide the Union with requested information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of the unit employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On the Union's request, rescind the unilaterally implemented changes in terms and conditions of employment, and restore the Baylor Incentive Program and the previously existing health insurance plan.

(c) Make whole the unit employees for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, in the manner set forth in the amended remedy section of this decision.

(d) Rescind the unilateral change in the access rights of union representatives to its facility.

(e) Provide the Union with the information requested in its letters dated January 19, June 20, and July 17, 2006, excluding employees' social security numbers.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Wayne, New Jersey, copies of the attached notice marked "Appendix B."[9] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2006.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 5, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT bypass SEIU 1199, New Jersey Health Care Union or any other labor organization and deal directly with our represented employees with regard to wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

PRINCETON HEALTH CARE, LLC
D/B/A PAVILIONS AT FORRESTAL

[9] Id. at 4.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) as the exclusive bargaining representative of the employees in the unit described below by engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates, and unreasonably failing and refusing to meet and bargain for a successor collective-bargaining agreement. The unit is:

> All full-time and part-time certified nurses' assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

WE WILL NOT unilaterally change terms and conditions of employment or other mandatory subjects, without providing the Union with notice and an opportunity to bargain.

WE WILL NOT fail to provide the Union with requested information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request, bargain with the Union as the exclusive representative of our unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on the Union's request, rescind our unilaterally implemented changes in terms and conditions of employment and restore the Baylor Incentive Program and the previously existing health insurance plan.

WE WILL rescind our unilateral change in the access rights of union representatives to our facility.

WE WILL make the unit employees whole, with interest, for loss of earnings and benefits suffered as a result of our unlawful unilateral changes in terms and conditions of employment.

WE WILL provide to the Union the information it requested in its letters dated January 19, June 20, and July 17, 2006, excluding employees' social security numbers.

ATRIUM AT PRINCETON, LLC D/B/A PAVILIONS AT FORRESTAL

Laura Elrashedy and *Bernard Mintz, Esqs.,* Newark, NJ, for the General Counsel.
Alex Tovitz, Esq., (Jasinski & Williams, P.C.) of Newark, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. This case was tried before me in Newark, New Jersey on July 9, 10, 13 and on October 9 and 18, 2007. A consolidated complaint was issued against Atrium at Princeton, LLC d/b/a Pavilions at Forrestal (Atrium) and Princeton Healthcare LLC d/b/a Pavilions at Forrestal (Princeton), herein variously called Atrium, Princeton, Respondent, Employer, or Respondents, on December 29, 2006 based on various charges and amended charges filed by SEIU 1199 New Jersey Health Care Union (Union).[1]

The complaint alleges essentially that certain unfair labor practices were committed by Princeton, an owner of a nursing home, and by its purchaser and successor Atrium. Specifically, the complaint alleges that on about August 24, 2005, Princeton bypassed the Union and dealt directly with its employees by making a contract proposal to them before the proposal was made to the Union.

It is further alleged that from about August 25, 2005 to about December 9, 2005, Princeton failed and refused to bargain with the Union over a successor collective-bargaining agreement by engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates it had

[1] The charge in Case No. 22–CA–27066 was filed on August 31, 2005. The charge, first amended charge, second amended charge, and third amended charge in Case No. 22–CA–27289 were filed on February 23, April 27, May 22, and May 31, 2006, respectively. The charge, first amended charge and second amended charge in Case No. 22–CA–27315 were filed on March 15, April 27, and May 22, 2006, respectively. The charge in Case No. 22–CA–27601, was filed on October 4, 2006. A copy thereof was inadvertently omitted from the exhibit file. General Counsel's unopposed motion to include it is granted.

proposed to bargain, and by unreasonably failing and refusing to meet on nearly all of those dates. The Respondent admitted that Atrium became the successor to Princeton on or about December 9, 2005. The complaint alleges that Atrium committed the same violations from about December 9, 2005.

It is also alleged that in about January, 2006, Atrium changed the health insurance plan that covered unit employees' health expenses, and that on about March 1, 2006, Atrium eliminated the Baylor Incentive Program which provided monetary incentives for licensed practical nurses who agreed to regularly work on both Saturday and Sunday every weekend. It is alleged that these changes are mandatory subjects of bargaining and that they were made without notice to the Union and without affording it an opportunity to bargain concerning the changes.

The complaint further alleges that since about July 20, 2006, Atrium changed the access right of Union representatives to its facility by denying them such access rights. Finally, it is alleged that on January 19, June 20 and July 17, 2006, the Union requested certain relevant information, and that the Respondent has failed and refused to furnish it.

The Respondent's answer denied the material allegations of the complaint and asserted certain affirmative defenses which will be discussed below. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

During the 12 months prior to the issuance of the complaint, Princeton and Atrium has each derived gross revenues in excess of $100,000 from its respective operations, and during that period of time each has purchased and received at the Pavilions facility goods and materials valued in excess of $5,000 directly from points outside New Jersey. The Respondent admits and I find that Princeton and Atrium each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The former owner of the Respondent was Princeton, which owned the real property. Hospicomm, which held the license for the facility, was its operator and manager. Atrium bought the property from Princeton and took over the operator's license and management of the facility from Hospicomm. The Respondent stipulated that Atrium is the successor employer to Princeton. The facility was at all times called Pavilions at Forrestal. There was no break in service for the approximately 125 employees between the time they were employed by Princeton and the time they were employed by Atrium.

The Respondent admits that on March 20, 2001, the Union was certified as the exclusive collective-bargaining representative in the following appropriate unit:

> All full-time and part-time certified nurses assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

The Union and the Respondent have been parties to collective-bargaining agreements for a number of years, the Union being the successor to Local 1115 which previously represented the employees. The Respondent's predecessor, The Plaza Regency at the Windrows and the Union were parties to a collective-bargaining agreement which ran from December 5, 2001 to April 3, 2005. This case arises from negotiations between the parties for a successor agreement.

B. The Bargaining

1. The Union's strategy in the 2005 negotiations

Odette Machado, the Union's former director of administrative organizing whose duties were to supervise training of delegates, coordinate organizers and lead contract negotiations, was privy to the Union's plans for bargaining.

Machado testified that prior to the 2005 negotiations, she met with Larry Alcoff, the Union's coordinator of its long-term care division and an experienced union negotiator having bargained more than 100 contracts in the health care field. Together, they and the Union's staff outlined the Union's strategy for the upcoming negotiations in New Jersey. Machado stated that Alcoff said that the Union "had to meet certain standards . . . in terms of what we needed to settle a contract and we couldn't deviate from it because . . . we had certain provisions in the [Tuchman or master] contract, for example, the 'most-favored-nations' clause that we had to be consistent with what it called for or else the consequence would be that other employers who had a contract that was cheaper financially would be able to call for the same thing if we reduced the standards." Machado also stated that Alcoff said that the Union could not settle a contract until the contract "met certain standards" including the Benefit Fund, salary and parity increases, and additional sick days and holidays.

According to Machado, Alcoff told the Union agents that the David Jasinski-represented employers would be considered as one group and identified it as "the bad group" which "can't help but be [an] evil employer" which is taking the Union to a "race to the bottom and if we cannot meet the standards [or] get the contracts then we would have to really come down very hard on them." Machado also quoted Alcoff as telling the Union representatives that the strategy was to "go after the employers, go after their attorneys, go after the owners and . . . try to destroy them."

Alcoff testified that the Union sought to have as many contracts as possible expire in 2005 so that they could bargain them at the same time. The Union sought to achieve the

highest wages, benefits and other conditions of employment. For example, it attempted to establish a minimum pay of $10.00 per hour for unlicensed staff and for those working in the housekeeping, dietary and laundry departments, and $11.00 for certified nurses aides. In addition, the Union tried to achieve an average raise of at least 4% per year and sought to preserve fully paid health insurance, pension, paid time off, vacations, holiday, sick and personal days. Alcoff stated that the Union's goal in bargaining was to win contracts that achieved those standards across New Jersey; and that although there were variations in the Union's success in reaching those goals, it was the Union's aim to obtain those standards. He further noted that the Union agreed to contracts that did not meet those goals or standards, and they were not required of any employers at bargaining.

Alcoff denied telling Machado not to deviate from statewide standards. He stated, in fact, that the contract he negotiated with Meridian Nursing Home in 2005 contained no Benefit Fund provisions, and differed from the state-wide standards. Alcoff further stated that Machado negotiated a contract with Wellington Nursing Home which did not meet the standards for state-wide bargaining, and that she had the authority to negotiate and reach agreement on contracts that did not contain those standards.

2. The bargaining sessions

The chief spokesperson for the Respondent was its attorney David Jasinski. He was accompanied by John Pilek, the Respondent's administrator and thereafter by a new administrator, George Mervine. The Union's first chief spokesperson was Uma Pimplaskar. She was replaced by Justin Foley who was succeeded by Larry Alcoff. Prior to Alcoff's becoming the chief negotiator, he reviewed and approved the proposals drafted by Pimplaskar and Foley, and discussed with them the progress of the negotiations. An employee bargaining committee comprised of about 20 employees was present at each of the sessions.

All of the eight bargaining sessions were held at the Employer's premises. The bargaining culminated in an assertion by the Respondent that impasse had been reached.

a. The bargaining session of February 24, 2005

Pimplaskar and Foley attended the first session. Pimplaskar opened the negotiations by stating that the Union's New Jersey members at large, known at the "statewide bargaining guidance committee" had met and formulated "goals" for all new contracts being negotiated in that "cycle" and that the Union's proposal reflected those goals.[2] Pimplaskar testified that the Union sought to "accomplish" those goals as standards for the Union in these negotiations but that the negotiations were meant to be discussions on the proposals with the hope that the final agreement reached would be the "best solution" for the facility involved. Pimplaskar presented the Union's written proposal and discussed the items, outlining the changes sought from the prior contract and explaining how the changes conformed to the Union's goals it sought to reach in bargaining. She conceded that Jasinski told her that he was only concerned about reaching a contract for the employees employed at the Respondent's facility and was not concerned about the Union's state-wide bargaining goals. The session consumed 2½ hours.

The Union's proposal, in material part, stated that effective May 1, 2005, the Respondent shall make contributions to the 1199/SEIU Greater New York Benefit Fund (Benefit Fund) at the rate of 21% of gross payroll "which rate may be adjusted by the Trustees as necessary to maintain the level of benefits currently provided or as improved by the Trustees during the life of the Agreement. However, in no event shall the rate be increased above 24% of gross payroll during the life of this Agreement."

The proposal also demanded a 2½% of gross payroll contribution to the Pension Fund; a ½% contribution to the Training and Education Fund; and a ½% contribution to the Workers Alliance for Quality in Long Term Care.

According to Foley, Jasinski responded by saying that the Respondent was dissatisfied with the Union's proposal in that its demands were "unrealistic" since it was asking for "more and more." Jasinski contrasted the proposal with the expired contract which provided that the Respondent make payments for health insurance in the amount of $260 per month (about 13% of gross payroll not counting overtime pay) for all employees working 30 or more hours per week, and 2% to the Pension Fund. He termed the increases in contributions an increase from the prior contract and Foley agreed.

Jasinski testified that Pimplaskar's opening statement included her remarks that there were a number of provisions that were not negotiable, including health and welfare benefits and pension contributions. Jasinski stated that he responded by saying that the Union is bargaining in bad faith by refusing to negotiate about those matters. According to Jasinski, Pimplaskar also said that a state-wide group of employees, which was selected by the Union, had the authority to ratify the contract, and that the Respondent's employees would not ratify any agreement reached.

In contrast, Pimplaskar testified that the Respondent's employees would ratify the proposed contract, and denied telling Jasinski that the health and welfare and pension contribution proposals were not negotiable. Indeed, she stated that all the Union's proposals were subject to negotiations. She also denied that Alcoff told her that she could not deviate from the Union's initial proposals.

No agreement was reached on any term of the Union's proposal at that meeting.

At the session, Pimplaskar made an information request and thereafter, on March 10, the Respondent supplied certain cost reports.

b. The bargaining session held in March, 2005

The Respondent presented its proposal in which it agreed to minor changes such as a revision in the contract's cover and table of contents, a change in the Union's address, and the addition of "sexual preference" to the listings in the "No

[2] Jasinski asked for the names of the people comprising the committee. Pimplaskar said that she would provide that information. Foley did not know whether she had.

Discrimination" clause. The proposal did not include any items dealing with economics but Jasinski stated that they would be provided following the Union's presentation of its entire economic proposal. As of this meeting, the Union had not made any proposal concerning economic terms. Jasinski and Pimplaskar discussed the Employer's proposal. According to Jasinski, Pimplaskar repeated that the Union would not entertain negotiations regarding its health and welfare or pension proposals.

Jasinski stated that following this session, Alcoff phoned him, claiming that the Union would get the contract it wanted "one way or another." Alcoff insisted that the Union wanted the "master agreement" and regardless of what he (Jasinski) does, the Respondent is "powerless," adding that he should not "waste his time" and that he should not even negotiate. Jasinski responded that he intended to negotiate a contract for the Respondent which will address the needs of the facility and its employees. Jasinski did not mention this call in any letter that he sent to the Union complaining about its alleged bad faith bargaining.

Alcoff denied having this conversation with Jasinski, and indeed denied speaking to Jasinski about the negotiations with the Respondent before he became the lead negotiator in August, 2005.

Justin Foley Becomes the Chief Union Negotiator

The collective-bargaining agreement expired on April 3, 2005. In early April, Foley was appointed the chief negotiator. Foley had acted as lead negotiator in the negotiation of two contracts which he bargained to conclusion. During the course of the bargaining here he consulted with Union president Milly Silva and Alcoff, who described Foley as "inexperienced."

On April 1, Jasinski wrote to Foley requesting certain information and asking for a full economic proposal from the Union. On April 12, Jasinski requested information regarding the Benefit Fund. On April 18, he wrote that he received certain information from the Union which was responsive, in part to his request. However, he requested certain additional financial records regarding the Benefit Funds. In the letter, Jasinski asserted that the Union's bargaining position was that any proposals regarding the Benefit Funds and the Respondent's contribution thereto are "non-negotiable." Foley denied that the Union took that position, but also did not respond to Jasinski's assertion because "it seemed false on its face." As further proof that that statement was not made, Foley offered that the Union continued to negotiate and make proposals thereafter.

c. The bargaining session of June 8, 2005

The Respondent and the Union signed an agreement which extended the expired collective-bargaining agreement. The parties bargained regarding noneconomic items: layoff and recall; discipline and discharge; transfer and promotion; seniority and the grievance process. No agreement was reached on any items at this session. Jasinski testified that he repeated his request that the Union provide a full economic proposal. The Union asked for the information it had previously requested from the Employer.

Between June 8 and the next session, Foley was notified by the Benefit Fund that the Respondent was delinquent in its payments to the Fund.

A flyer was circulated by the Union advertising a June 11 workshop for Union members, including those at the Employer, where the following was addressed: "How do we win what members at 20 other nursing homes have gotten?"

d. The bargaining session of July 7, 2005

The parties discussed the Union's outstanding information requests, and presented their full economic proposals. Foley read aloud the Union's economic proposals in the context of its goals, and he withdrew the proposal for contributions to the Legal Fund.

In material part, the Union's proposals consisted of the following wage increases: 8% effective April 1, 2005; 4% effective April 1, 2006; 4% effective April 1, 2007 – a total of a 16% increase over three years. Alcoff testified that the 2004 "make-whole" wage increase, discussed below, was included in the 8% first year wage demand. The proposal also included three additional sick days, more vacation days, more holidays, and parity increases which provided that by the end of the three year contract, certain categories of employees would have minimum hourly rates of $10, $11 and $22.

The Union's written proposal demanded that the Employer pay 22.33% of gross payroll to the Benefit Fund. Foley testified that in actuality the proposal was 22.33% *over the life* of the agreement although he conceded that the proposal does not contain such a limitation. He told Jasinski that the Respondent could accept the Union's first proposal, made on February 24, that the Employer contribute at a rate of 21% of gross payroll capped at 24%, or the current proposal of 22.33%. Alcoff testified that the Union's 22.33% proposal amounted to about $425 per employee per month, or an approximate annual increase of $185,000 in contributions from the Employer's current payment of $260 per month or 13% of gross payroll.

In connection with the Benefit Fund, Foley advised that Tony Petrella, a Benefit Fund employee, told him that the Employer was not contributing to the Benefit Fund and as a result, employees' health insurance was in "jeopardy." Jasinski denied that assertion.

The Respondent's proposal included a wage increase of 3% effective September 1, 2005; 2% effective September 1, 2006; and a 2% raise effective September 1, 2007. The Employer also proposed a merit pay clause, and a "no frills" rate of $11.50 for unlicensed personnel and $23 for licensed practical nurses. The Employer offered to pay 16% of gross payroll to the Benefit Fund for the life of the agreement which, according to Jasinski, was about the same as its current payment of $260 per month. The Respondent also proposed giving a $100 "stipend" to those employees who chose not to be covered by the Benefit Fund.

Foley testified that he believed that Jasinski knew that his 16% offer would be unacceptable to the Benefit Fund's trustees because it set the minimum contribution rate for participation in the Benefit Fund, and he also believed that in mak-

ing that offer Jasinski sought to cease the Respondent's participation in the Benefit Fund.

The bargaining consisted of a discussion concerning the non-economic matters previously addressed at the June 8 meeting. The only agreement reached concerning those issues was the Respondent's acceptance of three of four clauses in the Union's proposal concerning discipline and discharge.

Jasinski testified that he was shocked at the Union's increased demands and told Foley that it did not appear that the Union was serious about reaching agreement. As an example, Jasinski told Foley that the Union's proposal regarding "no frills" and "agency" employees demonstrated that the Union was not seeking a contract for this facility since it had no "no frills" or agency employees. Jasinski quoted Foley as repeatedly saying that his "hands were tied" concerning certain proposals which he could not discuss or modify, and that he could not deviate from the terms of the Tuchman master agreement because the most-favored-nations clause in that contract prohibited the Union from giving the Respondent more favorable provisions because such terms would have to be applied to every signatory of the contract. Jasinski told him that he sought to negotiate a contract for the Respondent only.

That most-favored-nations clause was in effect at that time since the Tuchman agreement had been executed in June. The clause states in material part as follows:

> Article 35 – Most-Favored-Nations
>
> 35.1. The Union, having committed itself to achieving better working conditions for all employees in the nursing home industry, represents that it intends to provide the same conditions for workers in all nursing homes with which it has collective bargaining agreements.
>
> 35.2. In the event the Union enters into any collective bargaining agreement … on or after April 1, 2005 with a proprietary nursing home in New Jersey which provides for more favorable economic terms and conditions to the employer than those contained herein, such more favorable terms and conditions shall automatically be applicable to the Employers, except that this provision shall not apply … [listed are exceptions not applicable to the Respondent].
>
> 35.3. This provision will apply only to the net economic impact reflected by the modifications provided for in this Agreement.

On July 15, the day Foley left his employment with the Union, he wrote to Jasinski suggesting an off-the-record conversation in order to determine why the parties are "so far apart on the economics." Foley questioned the Respondent's "ability or will to meet the Union's stated goals." Foley's letter was addressed to Jasinski regarding the five facilities they were bargaining for at the time. The Respondent objected to addressing the same letter to five facilities. Foley's reasons were that the facilities were related, Jasinski was bargaining in behalf of all of them, the letter's contents related to all five facilities, and he believed that it was too time-consuming to send identical letters to Jasinski for each facility. Foley also sent an exit memo to Union president Silva in which he characterized Jasinski as the "enemy" and that "management has put the standard Jasinski bullshit on the table."

Jasinski testified that he believed that Foley's mention of the Union's "stated goals" referred to his insistence that the Respondent accept the terms of the master agreement.

e. The bargaining session of August 12, 2005

Larry Alcoff became the Union's chief negotiator in July, 2005. This bargaining session consumed about two hours.

Prior to commencing bargaining, the Union, including president Silva, Alcoff, organizers Norman DeGeneste and Henry Rose met with an employee committee consisting of about 20 workers. This meeting took about one hour. It was a contentious session with Alcoff explaining that the Respondent had not been paying its contributions to the Benefit Fund for nearly one year and was $350,000 in arrears, and that if no payments were made their benefits would be canceled by the Fund.[3] The employees responded that the Employer told them that the Union was lying and that it was current in its payments. The workers told Alcoff that they had not received a wage raise since 2003 and also wanted more paid holidays, vacation days, sick days, pension, daily overtime and a shift differential.

The employees also claimed to be owed a wage raise due to a wage reopener in 2004 that was the subject of a pending unfair labor practice proceeding.[4] The employees believed that they were entitled to a 4% wage increase pursuant to the reopener. The Respondent argues and I agree that there is no evidence as to the amount of any wage increase due pursuant to the reopener.

The employees voted to present a "package proposal" to the Respondent in which the Union would abandon the 2004 wage increase if the Employer would accept the package. Accordingly, the Union submitted a proposal which provided for wage increases of 3% effective August 1, 2005; 2.5% effective August 1, 2006; 2% effective March 1, 2007; 2.5% effective August 1, 2007; and 2% effective March 1, 2008. Thus, the Union's proposal sought an increase of 12% over the life of the contract, as compared to 16% in the proposal made on July 7.

The proposal also provided for a shift differential of 50 cents per hour for the second shift and 80 cents per hour for the night shift. The Union sought to have the differential applied to all employees, whereas the expired contract stated that it applied only to employees hired on or before December, 2001.

Joanne Plummer, a former employee of the Respondent who left her job in 2004 but nevertheless attended most bar-

[3] Alcoff obtained this information from Timothy Wells, the Benefit Fund administrator.

[4] The expired contract contained a "contract reopener" provision pursuant to which the parties agreed to meet no later than March 1, 2004 to negotiate wages and benefits for the last year of the contract, with such wages and benefits being effective April 1, 2004. However, no wage increase was agreed to. See *Pavilion at Forrestal Nursing & Rehabilitation*, 346 NLRB 458 (2006).

gaining sessions in 2005 as a current Union member, testified about this session. She stated that the employees and Union committee members insisted that they were due a 4% raise pursuant to the contract reopener in the prior contract, and they understood that the raise would be given prior to the effective date of the new contract. Plummer stated that Alcoff and Silva sought to forego the 4% raise and just ask for 3%. In fact, as testified by Alcoff, the Union's demand for an 8% wage increase made at the July 7 session was intended to include the 2004 "make-whole" increase which was supposed to have been renegotiated pursuant to the reopener clause in the prior contract.

Plummer first testified that Alcoff explained that he took the 4% raise "off the table" because the Union wanted all its contracts to be the same—to follow the same "format"—all of the contracts were supposed to have the same provisions and end at the same time so that they could be renegotiated together. She then stated that as part of the 3% proposal, the Union asked for a package including an increase in starting rates, parity increases and more holidays which Jasinski rejected.

In this respect, the proposal did not increase the wage rate of the certified nurses aides (CNA), the licensed practical nurses (LPN), or maintenance/unit clerks for the life of the three year contract because the rates those employees were then receiving were "competitive." The only rates that were raised over the life of the contract was the Grade 1 housekeeping/dietary/laundry workers where they were raised, in the first year, from their current wage of $8.25 to 8.73.

The Union's proposal also provided that the Respondent make contributions to the Benefit Fund at the rate of 22.33% of gross payroll, but if the trustees, in their discretion, determine that contributions in excess of 22.33% are needed, the parties can meet to propose plan revisions to keep the rates at 22.33% or modify other parts of the economic costs of the contract so that the full percentage required by the Trustees is maintained. If the parties cannot agree on plan revisions to maintain the rate at 22.33%, the dispute shall be submitted to arbitration with Martin Scheinman, but "in no event shall the contribution requirement of the Employer exceed 22.33% of gross payroll … except by mutual agreement." The contract further provides that if the trustees determine that the Benefit Fund will no longer cover the employees, the parties "shall promptly meet to negotiate acceptable replacement coverage."

The Union's proposal provided for two additional paid holidays, one paid sick day per year, increased vacation entitlement, overtime pay after 37½ hours, ½% of gross payroll for the Training and Education Fund, and ½% for the Alliance Fund. The Legal Fund proposal was deleted "based on agreement on the Benefit Fund." Alcoff stated that the Respondent had not been paying its Pension Fund contributions, and he offered to waive the prior payments if it would begin paying into the Pension Fund at a rate of 2% of gross payroll effective January, 2006.

Jasinski testified that he told Alcoff that the Union's proposal represented a "dramatic raise" in the economic obligation of an Employer which had "serious financial problems." Alcoff's response was that the employees had not received an increase in recent years. Jasinski replied that he offered a 3% raise effective August 1, 2005 which was rejected by Alcoff.

Jasinski also quoted Alcoff as saying during the negotiations that he could not deviate from the terms of the Tuchman master agreement because the most-favored-nations clause in that contract prohibited the Union from giving the Respondent more favorable provisions because such terms would have to be applied to every signatory of the contract. In this regard, Alcoff testified that the most-favored-nations clause was not new at the time of this negotiation. It existed in prior contracts involving New Jersey facilities. He stated that a violation of that clause is hard to prove because of variations in each facility: the employees' hours of work, the number of employees employed, varying benefit levels, turnover rates, and because more than one employer would be required to release proprietary information for comparative purposes which they would be reluctant to do.

Alcoff stated, moreover, that nursing homes such as Canterbury, Buckingham and Windsor Gardens,[5] which had contracts with the Union, and other nursing homes whose contracts were negotiated in 2005, such as Southern Ocean Nursing Home, Voorhees Nursing Home, Marcella Nursing Home, Meridian Nursing Center, Westfield Nursing Center, and Wellington Hall were not covered by the Benefit Fund.

Jasinski also testified that at each bargaining session, including this one, he (Jasinski) requested that a mediator be engaged to help the parties reach agreement. Alcoff responded that a mediator was not necessary, and that he did not like and did not want a mediator, and refused the assistance of a mediator. Jasinski conceded that he did not make reference in any of the numerous letters he wrote about Alcoff's alleged bad faith bargaining to the fact that he refused to have a mediator present. Alcoff testified that he did not believe that Jasinski requested that a mediator be present at negotiations. He stated that he may have told Jasinski that he was occasionally not impressed with the roles mediators play but he denied saying that the objected to a mediator's presence, particularly since he requested a mediator, in writing, on several occasions during the bargaining.

Alcoff stated that at this session the Union agreed to nearly all of the Employer's grievance and arbitration proposals. No other agreement was reached on any other terms of the proposals. As will be set forth below, Jasinski testified that Alcoff claimed that the Respondent had no right to implement the Baylor Incentive Program. Jasinski responded that both parties agreed to it one year earlier.

f. The bargaining session of August 17, 2005

This session consumed about two hours. Prior to meeting with the Respondent, Alcoff and Silva met with the employee committee, more than 10 of whom no longer agreed

[5] Windsor Gardens' nine housekeepers were covered by the Fund, but not the rest of that facility's 140 employees.

with the Union's package presented at the last meeting and wanted the 2004 "make-whole" raise.

At the session, the Union presented a Benefit Fund auditor who confirmed that the Respondent was $350,000 in arrears in payments to the Fund. The Employer admitted owing that sum. The Employer gave the Union a summary chart which stated that it was operating at a deficit. Alcoff responded that the Employer could not claim financial distress because it had not given a wage increase in two years, it had not paid its contractual contributions for health benefits and pension, and had not remitted Union dues payments it received from its employees.

A side issue was raised whereby Alcoff claimed that the Respondent was required to make contributions to the Benefit Fund for any employee working three months or more. Jasinski argued that the Fund covers employees working more than six months pursuant to a signed memorandum of agreement. This issue was not resolved.

Jasinski proposed a wage increase of 3% to be effective August 1.[6] The Union rejected that offer and instead wanted a response from the Employer on the Union's entire package.

g. Events in mid-August

On August 19, the Union sent a 10-day notice of strike, picketing or other concerted refusal to work which was scheduled for August 30.

Administrator Pilek sent a letter to employees and family members of the residents dated August 24 which stated that the Employer had received a notice from the Union that it intended to engage in a job action beginning August 30 and that the Employer had taken steps to ensure that the residents were taken care of. The letter stated that the Employer did "everything it could to avoid this action" including meeting with the Union and proposing a new contract which included wage increases totaling 12%, contributions of 16% to the Benefit Fund, paid vacation, holidays and sick days, but the Union "flatly rejected our proposal. Instead, they are insisting that we agree to a contract that was agreed to by other Employers who are in a different situation than we are in." Jasinski stated that the purpose of the letter was to "calm" the family members as to the safety of their relatives and to advise them of the Respondent's position in the bargaining.

The letter came as a surprise to Alcoff since the only Employer offer on the table at that time was a 7% increase over three years (raises of 3%, 2%, and 2%). In addition, the Union had not received any Employer proposal for additional vacation, holiday or sick days, and therefore could not have rejected such an offer as the letter claimed.

h. The bargaining session of August 25, 2005

Alcoff asked Jasinski if he was aware of Pilek's August 24 letter. Jasinski replied that he was, and Alcoff said that he had never received such a proposal. Jasinski said "you will" and then orally offered a 12% wage raise over four years. Jasinski then rejected the Union's package offer made at the August 12 session. In this connection, Jasinski stated that the Employer's July 7 proposal arguably represented a 12% raise, but conceded that an express 12% raise had not been made prior to this session.

Alcoff then presented a written offer which modified the Union's wage offer. It demanded a wage increase of 7% in the first year instead of 3% as in its prior proposal. This was an effort to recoup some of the "make-whole" raise that was not given. Alcoff stated that even though he had stated in the prior session that he would forego the 2004 raise, this proposal demanded a 7% raise. Alcoff's reasoning was that the prior proposal was conditioned on the Respondent accepting the Union's package, and once that package was rejected, it was off the table, and the Union sought to obtain its "make-whole" raise. In addition to the 7% first year raise, the proposal asked for increases in subsequent years, for a total of a 16% wage increase. The proposal also reduced the amount of parity raises to 11 cents per hour from 21 to 23 cents.

Alcoff conceded that this proposal was more costly to the Employer than the Union's earlier offer made on August 12. Upon seeing this new offer in which the first year raise was increased from 3% to 7%, Jasinski "exploded" and accused the Union of bad faith and regressive bargaining. Jasinski testified that he told Alcoff that he believed that the Union had no intention of bargaining in good faith and left the room with his committee.

Alcoff met with the employee committee and then asked Jasinski to return, telling him that although the Union's package was rejected the Union wanted to move the bargaining forward and accordingly orally modified its current proposal, as follows: Seven holidays, with time and one-half only for Christmas Day, New Years Day and Thanksgiving Day; the vacation days offer was modified; the sick day proposal was modified by moving it to the third year of the contract; contributions to the Training and Education Fund and to Alliance would be postponed for five months, until January 1, 2006; contributions to the Pension Fund would be reduced from 2% (27 cents per hour) to 15 cents per hour; the overtime provision was withdrawn.

Jasinski testified that during his caucus he and Pilek decided to present their last offer. He told Alcoff that the following was his "final, last and best offer." Jasinski agreed to a three year contract and stated that he "adopted" the Union's wage proposal previously made at the August 12 session of 3%, 2.5%, 2%, 2.5%, and 2% to be in effect on the dates proposed by the Union at that session, and also offered a merit pay base increase which the Employer previously made at the July 7 session. The Respondent agreed to contribute 16% of payroll to the Benefit Fund, but did not agree to the parity raises demanded by the Union.

Jasinski stated that after making this final offer, Alcoff made no counter-offer and the meeting ended with no dates for a new meeting set. With the Union's job action set for August 30, Jasinski testified that Alcoff used the strike threat as a "club" and told him several times during this session that the Union would strike because the Employer was not "towing the line" and not "coming in under the terms that he

[6] Alcoff believes that the Employer's proposal to implement the wage raise was made at this meeting but it may have been made at a later session.

wanted." Alcoff denied that the Employer made a "final offer" at this session or at any other bargaining session.

Former employee Plummer testified that when she protested to Alcoff about the absence of the 4% raise in the Union's offer, he said that he had already agreed with Jasinski about a 3% raise, and he needed a reason to reopen the matter so he could request the additional 4% raise that was due from 2004. He allegedly told her that the reason he would give to reopen the matter was that he did not agree to the Respondent's proposal. Plummer further stated that when Jasinski offered the 12% raise, he said that it was his "final offer." She said that the employees refused to accept that offer because the 4% raise which was due them in 2004 was not added to the offer. She did not recall if the Union made a counter offer that day.

Employee Jeanette Dieujuste testified that when Jasinski offered a raise of 3%, Alcoff attempted to have the 2004 4% raise added to that offer. At that time, Jasinski became "upset" because Alcoff had withdrawn his demand for the 4% raise and now wanted to put it back. Jasinski said that he had just made his "final offer."

Plummer further stated that later on in that session or in the next bargaining meeting, the Union made an offer of a 4% raise. She stated that the meeting was occasioned by "much disrespect" between Alcoff and Jasinski. She recalled that proposals were exchanged at that meeting but did not know their content. However, none of the proposals were acceptable to either side.

i. Events from August to November

The employees and the Union decided to engage in informational picketing and not a strike on August 30. Notice to this effect was sent by the Union on August 29 as a "follow-up" to its letter of August 19.

The August 30 letter to Jasinski set forth the Union's proposal and the "substantial modifications proposed" in material part, as follows:

- Article 8 – Grievance-Arbitration: Reduce the number of days to file a grievance to 14. The expired contract required that a grievance be filed within 10 days. The Union's August 12 proposal increased the number of days to 30.
- Wages – Modify the Union's August 12 proposal by adding a 4% increase for employees hired on or before April 1, 2004 (reduces impact of parity raise and only applies to about 60% of workforce).
- Shift Differential – Union withdraws proposal to apply shift differential to employees hired after December 5, 2001.
- Health Insurance – No change in current Union proposal – 22.33%.
- Holidays – Modify Union's proposal by reducing the number of proposed premium holidays from 7 to 3 (Thanksgiving, Christmas, New Year's).
- Vacation – Union modifies proposal by withdrawing vacation improvements for any employee with less than 10 years of service; effective 1/1/08, add 4 weeks of vacation after 10 years of service.
- Sick Leave – Union modifies proposal by adding three sick days effective 1/1/07 rather than adding one in each year of the contract.
- Training and Alliance Funds – modifies the proposal by moving effective date from 8/1/05 to 1/1/06.
- Overtime – Union withdraws proposal to add daily overtime.
- Pension Fund – Union modifies proposal by reducing from 2% on 1/1/06 to $.014 per hour. Increase to 2.5% effective 3/1/08.
- Union rejects all other Employer proposals.

Alcoff's letter asked Jasinski to contact the Union regarding available dates for bargaining, and closed with the following statement: "We maintain that our August 12 economic proposal reflected a conditional withdrawal of the 2004 raise subject to an agreement on the whole package. I therefore presented a proposal to you on August 25 that preserved our right to negotiate over the 2004 re-opener but that reflected a substantial reduction in the cost of the total economic package in the 2005 successor agreement we have been trying to negotiate with you."

On September 6, John Pilek, the Respondent's administrator made a payment to the Benefit fund in the amount of $240,100 for the period December 1, 2003 to June 30, 2005.

A petition dated September 7 containing 30 employee signatures stated that the signatories no longer wanted to be represented by the Union and were voting the Union "out" of the Employer. Alcoff denied seeing the petition or having any knowledge of it.

On September 30, Alcoff sent a letter to Jasinski stating that the Union was available for negotiations on October 6, 7, 12 and the week of October 17 through 21. In addition, he requested that a mediator be present. Alcoff testified that Jasinski did not respond to the request for a mediator and did not agree to any of the eight dates suggested although Alcoff was in contact with Jasinski's office in an effort to arrange dates for negotiations. Jasinski could not recall receiving this letter which, unlike other letters sent by the Union, was unsigned and not on the Union's letterhead.

At hearing, Jasinski testified that he heard that Alcoff told Pilek that he (Jasinski) was the "problem" in achieving a contract. According to Jasinski, Alcoff told Pilek, who did not testify, that he did not want to negotiate with Jasinski and that if the Employer removed Jasinski a contract could be reached.

In response, on October 4, Jasinski wrote to Alcoff accusing him of contacting the facility and its representatives "in an attempt to negotiate this contract" and telling Pilek that he did not want to negotiate with Jasinski. The letter noted that such conduct constitutes an unfair labor practice and demonstrates the union's bad faith bargaining and intent not to

reach an agreement. The letter also stated that Alcoff "continued to force upon the employer an industry-wide contract which was agreed to by other employers" and has made no "substantive changes to address the needs of this facility and its employees." The letter further stated that after the Respondent rejected the Union's proposal Alcoff modified it by increasing the cost of the contract to the Respondent. The letter also stated that Alcoff's proposed eight dates for bargaining "conflict with matters which cannot be rescheduled" and offered to meet during the week of October 25.

Alcoff replied by letter of October 10 stating that the Union made "numerous accommodations to the specific conditions faced" by the Respondent. He conceded that the Union's current proposal set forth in his letter of August 30 "while perhaps more costly than your current proposal is not regressive from our prior proposal." Alcoff also admitted asking an official of Hospicomm which owns the Delaire Nursing Home why he (Alcoff) was able to reach a new contract after "smooth" bargaining where Jasinski was not the negotiator, but is having "incredible difficulties" reaching agreement with the Respondent. He may have said that the only difference in negotiating the two contracts was Jasinski. Alcoff stated that he told the official to inform the Respondent that the Union wanted to achieve a contract. Alcoff testified that the Union did not propose an "industry-wide" contact. The letter added that the Union was available for negotiations on October 26, 27 and 28 and asked Jasinski to reply as soon as possible. Alcoff concluded by saying that he would contact "the mediator" and request his presence at the negotiations.

Alcoff testified that he called Jasinski's office which informed him that Jasinski was not available on those dates. A bargaining session was scheduled for November 3. Jasinski cancelled that session because his office said that he was not available, but according to Alcoff, Jasinski actually bargained with him that day at another facility. Accordingly, Jasinski was available to bargain that day, but not for the Respondent.

Thereafter, Alcoff wrote a flyer stating that the Union won a fair contract "that meets the Union standard in the state" at Delaire Nursing Home. It outlined the features of the Delaire contract which included a wage raise of 12% over three years and a Benefit Fund contribution of 22.33%. Alcoff stated that the 22.33% rate was "part of the standards and the pattern of bargaining and the goals that we had in 2005" although not all employers participated in the Benefit Fund.

On November 14, Alcoff wrote to Jasinski stating that in addition to his letters of August 30, September 30 and October 10, he spoke to Concetta from Jasinski's office many times requesting negotiations, adding that Jasinski had not provided any dates for bargaining although Jasinski had offered November 3 but then Jasinski canceled that session. Alcoff wrote that the Union was available on November 21-23, 28 and 29, December 1-2, 6-8, 9, and 13-16, and that he had given the New Jersey Board of Mediation more than 20 possible dates that he is available through late December.

Jasinski replied on November 16, agreeing to meet on November 29 and December 2. On November 21, Alcoff responded, agreeing to meet on both dates.

On November 23, Alcoff wrote to Jasinski stating that administrator Pilek informed Union agent DeGeneste that there had been or will be a change in either the ownership or operators of the Respondent. Alcoff asked for information concerning the alleged change. No information was provided.

j. The bargaining session of November 29, 2005

The parties met on November 29 for about 1½ hours. Prior to the bargaining, Alcoff became aware of a memo distributed to employees which stated that "due to the change of ownership, direct [deposit] will be suspended for the pay date of December 2…. This will be your last paycheck issued by the current owner." Alcoff asked Jasinski about the memo and Jasinski replied that it was an error – that there had been no change in payroll or direct deposit. Jasinski further told him that he had no knowledge of any change in ownership of the Respondent.

Alcoff testified that he was reluctant to present a new proposal until he obtained clarification concerning whether there was a new owner or operator, and whether it intended to change the workers' terms and conditions of employment. Alcoff asked Jasinski about the new owners. Jasinski replied that Hospicomm is his client and he was prepared to bargain for Hospicomm. Jasinski asked if the Union would present a proposal. Alcoff said that he would defer presenting a proposal until their scheduled session on December 2 at which time he expected Jasinski to report as to the alleged change in ownership or operation of the facility. Jasinski asked Alcoff to put in writing any questions he had about the ownership of the facility. Alcoff said that the Union was prepared to modify its proposal at the December 2 meeting. At the meeting, Alcoff asked Jasinski to execute a memorandum of understanding to extend the term of the expired contract and Jasinski rejected that proposal.

Jasinski testified that Alcoff did not respond to his proposal made on August 25, rather he was only concerned with the "rumor" that the Respondent was being sold and wanted assurances that Jasinski was authorized to represent the Employer. Jasinski denied that Alcoff asked that the expired contract be extended.

Following the meeting, Alcoff wrote to Jasinski asking for the identities of the current owners, the buyer, whether Jasinski had the authority to bargain on behalf of the current owners or buyer, the contemplated changes in terms and conditions of employment, and also asked for an assurance that any agreement reached prior to the sale would continue in full force after the sale. Alcoff asked Jasinski to present the answers to these questions at the December 2 session.

On November 30, Jasinski replied, stating that he had presented the Employer's "final offer several months earlier." He accused Alcoff of engaging in "reckless bargaining by increasing the previous proposal never intending to reach a contract" while at the same time the Respondent made proposals which included wage raises, health benefits, and paid

time off. Jasinski stated that he was authorized to represent the Employer, and called the Union's offer to extend the contract a "silly trick." Jasinski further stated that the Union's questions concerning ownership of the facility "have no bearing on the contract negotiations since the names of the owners is irrelevant to the terms of a collective bargaining agreement." Jasinski concluded by stating that the Union has engaged in bad faith bargaining and that unless the Union makes a "meaningful contract proposal we see no purpose in meeting [on December 2]. Please propose other dates." At hearing, Jasinski explained that last sentence by stating that at their last session on November 29, Alcoff did not address the Employer's proposal.

Alcoff testified that Jasinski's use of the term "final offer" in the letter of November 30 was his first use of that term. He had not previously called the Respondent's proposal of August 25 a "final offer." Alcoff termed the bargaining "complicated" because of the employees' "high expectations" and demands which included the 2004 make-whole wage raise, and the issue of unpaid health insurance contributions, but he denied that the Union did not seek a contract. He stated that the Union sought to bargain and reach agreement and in fact had asked for a mediator to attend the sessions.

Apparently also complicating the bargaining was a hostile, divisive campaign for Union president which was going on at this time. Alcoff testified that shortly after the November 29 session, Odette Machado, an area director of the Union who had negotiated a reopener agreement with the Respondent in 2003, attended a meeting with Alcoff and the employees. Machado was a candidate for the presidency of the Union against incumbent Milly Silva who Alcoff supported. Many of the Respondent's employees, including Plummer who was her campaign chairman, supported Machado and much campaigning took place at the Respondent's facility. The purpose of the meeting was to calm the polarized work force and concentrate the Union's efforts on obtaining a contract.

Alcoff described a scene of "hostility" toward him and Silva with accusations that they conspired with the Respondent or among themselves in stealing money from the Union. The employees remarked that they wanted a contract but wanted Alcoff and Silva to be replaced as the negotiators and that the Union should appoint an attorney as its negotiator.

k. The events in December and January

On December 22, Jasinski wrote to Machado, an official of the Union, that at the last bargaining session the Union refused to respond to the Employer's last offer and has continued to insist that it agree to a collective-bargaining agreement "dictated by the Union" which does not reflect the "wants and needs" of the facility's employees as a condition of providing health care benefits to the workers. The letter claimed that the Union "aborted" the last session and has not scheduled any future meetings. Finally, the letter noted the communication received from Benefit Fund Administrator Timothy Wells on that day, described below, which, according to Jasinski, represented a "continued pattern and practice of bad faith bargaining." Machado testified that she did not respond to the letter since Alcoff was handling negotiations and it was his responsibility to reply.

On December 28, Alcoff wrote to Jasinski, offering to meet on January 4, 18, 19, 20, and the week of January 23, 2006. Alcoff stated that he did not believe that Jasinski agreed to meet on any of those dates.

A petition dated January 2, 2006, was prepared by employee Jeanette Dieujuste who supported Machado in the Union election for president. The petition, which bears the signatures of 72 employees, asked that Alcoff and Silva not represent them at any future negotiations. The petition also stated that on November 30 and December 2, Alcoff misled the employees into meeting for the ostensible purpose of discussing the contract but instead discussed Silva's candidacy for Union president.

Sometime prior to January 19, 2006, Alcoff asked administrator George Mervine, who replaced Pilek in January, 2006, whether Jasinski was still the chief negotiator. Mervine said that he was and that he represents the successor employer.

3. The union requests bargaining dates and information

a. The January request

On January 19, 2006, Alcoff wrote to Jasinski offering to meet on any and all dates in February, beginning on February 4. Alcoff stated that none of the dates were accepted by Jasinski.

The letter also advised Jasinski that the Union was told by the employees that a new health insurance plan was implemented without notice to the Union. In his letter, Alcoff asked the Respondent to meet with him to discuss the change, and also asked for a copy of the summary plan description, total premium costs, the costs to employees to obtain coverage under the new plan, and the number of employees who are covered under the new plan. Alcoff requested that information in order to bargain over the issue of employee health plan coverage. None of the information has been supplied.

On January 23 and 26, Jasinski wrote to Alcoff, asking him to supply an arbitration award issued concerning the Benefit Fund, and for a copy of the collective-bargaining agreement between Genesis Healthcare and the Union. Alcoff later supplied the documents requested. In one of the letters, Jasinski stated that the Union had announced that it seeks "parity with all other Healthcare facilities in New Jersey" and has "repeatedly stated that they cannot agree to any contract that deviates from contracts covering other New Jersey employers."

Alcoff denied that any Union representative made such statements. However, Alcoff also stated that the Tuchman master agreement covering 20 nursing homes and 2,000 employees contains standard language concerning union security, grievance and arbitration, etc., but for each facility it contains a "localized agreement" covering wages, vacations, holidays, sick days, personal days, health insurance eligibility, etc. He noted that all the signatories are party to the Benefit Fund and all contribute at the same rate but there are certain variations regarding eligibility for the Fund. Alcoff

further noted that one of the Tuchman facilities does not participate in the Benefit Fund. He further noted that he took language from the Tuchman contract and used it in his proposals with the Respondent. He conceded that the schedule of wage raises in the Union's proposal presented on August 12, 2005 is identical to that in the Tuchman contract.

Alcoff testified that certain contracts negotiated in 2005 and 2006 did not provide for contributions to the Benefit Fund, including seven nursing homes owned by Genesis Health Care.[7] Further, one nursing home, New Vista, which was included in the Tuchman contract, is not a contributory to the Benefit Fund.

A petition dated January 30, 2006 prepared by employee Dieujuste and signed by five "committee members" was handed to Mervine, and sent to the Union and to Board agent Gonzalez. It states that the employees did not want Alcoff and Silva to negotiate a contract for them because they did not trust the two Union officials. Instead, the employees wanted a Union attorney to conduct the negotiations. The letter directed Mervine not to schedule any negotiations with the Union until a Union lawyer agreed to negotiate.

On February 17, 2006, Jasinski wrote to Alcoff reminding him that about one month earlier he had requested an arbitration award and the "Genesis" collective-bargaining agreement and that neither had been provided. Jasinski also wrote that he had become aware of the petitions signed by employees regarding Alcoff and Silva and wanted an assurance that Alcoff represented the employees and was authorized to negotiate a contract. Jasinski asked for written authorization from a majority of the Employer's employees that they wanted Alcoff to represent them in negotiations.

b. Later requests for information and bargaining dates

On March 8, 2006, Alcoff wrote Jasinski that "you have provided no information that we have requested … on a repeated basis nor have you found the time to schedule bargaining at Pavilion…."

On April 11, Jasinski wrote for more information concerning the arbitration award and the Genesis contract that Alcoff had previously sent to him. He requested other contracts and certain financial information concerning the Benefit Fund. Jasinski further wrote that the Respondent received an employee petition stating that they did not want Alcoff to represent them in bargaining, demanding that a Union attorney represent them at negotiations, and asking that no negotiations be scheduled until a Union attorney was assigned to negotiate. Jasinski asked for evidence demonstrating that Alcoff had been designated as the employees' representative as no reply had been made to his February 17 letter asking for the same assurance. Jasinski concluded by asking to meet with the Union in late April or early May "provided you represent the employees."

On May 10, Jasinski wrote, again asking for confirmation that Alcoff represented the employees and stating that he had no objection to meeting with Alcoff or any other representative designated by the Union.

Alcoff stated that he was aware of the employee petitions and attributed them to the internal Union political campaign then ongoing. On May 15, Alcoff replied to Jasinski's April 11 and May 10 letters, stating that he was not certain why Jasinski sought information about the Benefit Fund since it was the Respondent's position that it would not participate in the Fund unless it could do so at a rate of no more than 16% which "falls far short of the 22.33% rate the Fund requires." In addition, Alcoff supplied the answers, as best he knew, to the questions posed by Jasinski, adding that no other facility adopted the terms of the Genesis contract.

Alcoff concluded by saying that he was appointed by president Silva to negotiate the contract, and was available to meet on all days between June 5 and 15. He added that Jasinski's "continued failure to schedule bargaining dates constitutes bad faith bargaining."

On May 20, Jasinski replied, saying that Alcoff's responses to his information requests were incomplete. He agreed to meet with Alcoff on June 12. Alcoff accepted that date and reminded Jasinski that he had "ignored all information requests regarding the health insurance benefits, other unilateral changes and updated employee information and asked that he be given that data by June 9.

Alcoff canceled the June 12 session—the first time the Union had canceled a bargaining session. His reason was that the counting of ballots in the internal union election campaign was scheduled for June 12 and he could not focus his energy on the negotiations.[8] Additional reasons were that the Respondent wanted the names of the employees who would be attending the meeting and Alcoff's organizer at the facility was Machado, Silva's opponent, who was not answering his calls for the names of the employees who would be present. Alcoff stated that if an employee bargaining committee would be present he would have attended the bargaining.[9]

On June 12, Jasinski wrote to the Board's Regional Office asserting that Alcoff and the Union have "repeatedly refused to meet and bargain…," citing the cancellation of that day's meeting, and asking that the instant charges be dismissed.

On June 20, Alcoff wrote to Jasinski that he was available to bargain on all dates from July 10 through the end of July. Alcoff testified that none of those dates were accepted by Jasinski. The letter asked essentially for an updated list of all unit employees by job classification, including their name, address, social security number, job title, date of hire, wage rate, shift, etc., since January 1, 2006; copies of correspondence to employees since December 1, 2005 regarding terms and conditions of employment; copies of personnel policies

[7] Westfield, Southern Ocean, Vorhees, Marcella, Park Place, Cranberry, Gateway.

[8] The General Counsel sought an explanation from Alcoff as to why he cancelled the June 12 meeting, but there is no evidence that he told Alcoff, as inaccurately set forth in the Respondent's brief, that his cancellation of the session "could be a problem for him in prosecuting the underlying unfair labor practice charges." Tr. 386.

[9] On February 2, the Regional Office dismissed a charge filed by an employee which alleged that the Union violated its duty of fair representation by campaigning for internal union elections instead of representing employees during contract negotiations.

or the employee handbook that was changed since December 1, 2005; summary plan descriptions of insurance plans offered to employees; cost to the employer and the employees of insurance plans; gross bargaining unit payroll from January 1, 2006 through May 31, 2006; and a summary of the policies and benefits offered to the "Baylor Nurses."

Alcoff testified that this was the first time he requested copies of correspondence and copies of personnel policies, handbook and payroll, and he sought the information for the periods set forth because the new owner purchased the facility in November, 2005. His further reasons for seeking the data were that he heard from employees that there were changes in their terms and conditions of employment including their dates of hire and their accruals of paid time off. Alcoff asked for a reply before July 1, and a response to all the Union's information requests by July 7.

On July 10, Jasinski wrote to Alcoff stating that it had responded to the Union's prior information requests in good faith and had been told by a prior Union agent that no further information was needed. He asked that Alcoff contact him regarding dates for bargaining. At hearing, Alcoff testified that the Respondent provided some information in response to certain requests but none of the information requested in his letter of June 20.

On July 17, Alcoff wrote Jasinski that the Union was available to meet on July 26-28, 31, and August 1. The letter repeated the request for information set forth in the June 20 letter. Alcoff testified that none of the dates set forth were agreed to by Jasinski and he was not provided with the requested information.

On October 23, Jasinski wrote to Alcoff stating that the Respondent presented its "last best offer" to the Union at their last bargaining session in November, 2005. The letter noted that "early in these negotiations the Employer provided the Union with all of the documents responsive to its information requests" but that at the last session the Union asked for more information—that which has already been provided. Jasinski further stated that the Union had an "unyielding bargaining position" due to the most-favored-nations clause negotiated with other employers. Jasinski further stated that the Union has not adequately addressed the fact of the employee petition which stated that the workers did not want Alcoff to represent them in bargaining. Finally, Jasinski stated that the parties are at "impasse" but he was willing to attend further bargaining sessions.

On November 13, 2006, Alcoff wrote, denying that Jasinski made a last, best offer on November 29, 2005. He stated that at that meeting one year earlier, the Respondent did not present a comprehensive proposal, but they discussed the open issues and said that the Union would have a counteroffer at the next session scheduled for December 2. Alcoff also disputed that the parties were at impasse. Alcoff advised Jasinski that his requests for information were justified because he learned that there were changes in employee terms and conditions of employment imposed by the new owners. The letter noted that he had requested such data in January, 2006, and that in May and June, 2006 he requested an updated list of employees and their terms because the last time he received such information was one year earlier prior to the change in ownershp. He further noted that none of that information was provided. The letter further stated that he was properly designated as the Union's chief spokesperson, and that "the discontent over the lack of progress in these negotiations, shared by the Union as well as employees, is a result of your continued unfair labor practices." Finally, Alcoff stated that the Union has stated that "we are open to considering health benefits other than those provided through the [Benefit Fund] because of your steadfast refusal to participate in the [Fund] under the conditions set by the Fund." Alcoff concluded that he was available to meet during the weeks of December 12 and 19 but that he needed the updated, current information requested in his June 20, 2006 letter.

Jasinski testified, denying Alcoff's version of the November 29 session. Specifically, Jasinski denied that open issues were discussed at that time, and also denied that Alcoff announced that he would make a counteroffer at the December 2 meeting. Jasinski stated that the only topic of discussion on November 29 was Alcoff's questions concerning the sale of the facility.

According to Alcoff, Jasinski did not agree to meet during the two weeks proposed by Alcoff, and no information was provided. Indeed, there was no evidence that Jasinski replied to Alcoff's letter of November 13.

Jasinski wrote to Alcoff on December 27, noting that at the last session one year earlier he presented a "final offer" while the Union did not present any counter offers. He accused the Union of stalling and delaying negotiations with no intention to reach agreement unless it was the "standard contact established by the Union." Jasinski offered to meet with the Union during the weeks of January 2 or 8, 2007. The letter also noted that that the Union, at the direction of the Benefit Fund, terminated the health plan for employees and that the Fund unilaterally changed the healthcare provider and decreased benefits. Jasinski stated that such action forced the Respondent to protect its workers.

Alcoff replied to Jasinski's letter on January 9, explaining that he just returned from vacation. He denied that the Respondent submitted a final offer at the last session in November, 2005 and asked that such an offer be provided in writing to him. Alcoff again requested the information set forth in his letter of June 20, noting that "you continue to ignore all information requests made by the Union." Alcoff wrote that he was available to bargain during the week of January 29. He also noted that the Benefit Fund and not the Union terminated the health plan because the Respondent failed to make contributions thereto and was "several hundred thousands dollars in arrears."

On January 17, Jasinski replied, insisting that a final offer was presented to Alcoff, and again asserting that the Union terminated the Fund benefits "in retaliation for the Employer's unwillingness to agree to a contract with identical terms as the Tuchman Master Agreement. You left the Employer with no choice but to offer alternate healthcare coverage. We proposed and implemented this plan to mitigate any losses and protect our employees. You should be grateful to

us." Jasinski also asserted that the Union engaged in a work stoppage. He said that the "information" would be sent to him separately.

Alcoff replied on January 19, denying that the Union made a contract with identical terms as the Tuchman contract a condition for settlement. He testified that the employees here had various demands specific only to the Respondent. Alcoff further stated that the Union did not terminate the Fund benefits, but rather the Benefit Fund did so because the Employer was in arrears in its payments.[10] He asked for the information requested from January, 2006.

Alcoff also denied that a work stoppage took place. Alcoff asked for a written copy of the Employer's alleged final offer, denying that one was made. He testified that he did not receive such a copy.

Jasinski testified that he "believed" that he sent the copy of the final offer to Alcoff, perhaps sometime after January 19, 2007, but did not know when. No copy of the final offer or a letter transmitting it was offered in evidence.

C. The Alleged Unilateral Changes

1. The health insurance plan

The Benefit Fund terminated benefits for the Respondent's employees on December 1, 2005 because of a failure by the Employer to make contributions to the Fund. On December 22, Benefit Fund director Timothy Wells sent a letter to the Respondent and the Union stating that if the parties reach agreement on a new collective-bargaining agreement providing for participation in the Benefit fund effective December 1, 2005, and if the Employer presents reports of earnings for December, 2005, eligibility for health and welfare benefits through the Benefit Fund would be effective retroactively to December 1, 2005.

On January 5, 2006, Machado sent an e-mail to Alcoff and Silva, notifying them that on December 22, Respondent administrator Mervine told her that employees' health benefits were terminated by the Benefit Fund, and that the Union had not contacted the "new management" to discuss wages, working conditions and benefits for the employees, but nevertheless the Employer wanted to ensure that the workers had health benefits. Machado called Fund administrator Wells who confirmed that benefits were terminated, but told her that if the Employer contributed to the Fund effective December 1, 2005, benefits would be reinstated. Machado called Silva and Alcoff to advise them of these facts but her calls were not returned.

Alcoff did not reply to Machado, but asked Mervine, in mid-January, about rumors he heard from employees of a new health plan. Alcoff testified that Mervine told him that the Respondent offered the workers the Health Net benefits plan. Alcoff told him that they had to bargain concerning that and that he was anxious to reach agreement. Mervine told him to speak directly to Jasinski. Alcoff further testified that no one from the Respondent notified him or the Union of the change prior to its implementation, and the Employer did not offered to bargain with the Union about such change.

The Respondent faults the Union for not providing for a plan to replace the terminated Benefit Fund. Alcoff properly testified that although he regretted that the Fund terminated the employees' benefits, his role was not to provide a contingency plan if the Respondent failed to make payments to the Benefit Fund and benefits are stopped. Rather, his responsibility is to negotiate a contract which includes health benefits.

2. The Baylor incentive program

The Baylor Incentive Program (BIP) is a vehicle used to provide an incentive for licensed practical nurses to work on the usually difficult to staff weekend shifts. Eight licensed practical nurses participate, constituting at least half the LPN work force.[11] They work virtually every weekend in 12 or 16 hour shifts over two days, for which the nurse receives full-time pay and full-time benefits. They typically work 32 hours per week and are paid for 40 hours. Jasinski testified that the program was discussed and agreed to by the Respondent and the Union in about August, 2004.

According to Jasinski, at the August 12, 2005 bargaining session, Alcoff objected to the fact that the Baylor nurses were receiving higher rates of pay than other LPNs, noting that the program and their rates were not provided for in the contract. Jasinski allegedly replied that if Alcoff did not want the BIP, the Respondent would eliminate it, but Alcoff objected to its termination. Alcoff denied that that exchange took place.

On February 8, 2006, the Respondent's Director of Nursing sent a note addressed to "Baylor nurses" which stated that effective March 1 it would no longer be able to offer the BIP. The letter asked the workers to speak to the staffing coordinator to discuss other options available to them. Alcoff gave uncontradicted testimony that the Union was not notified that the BIP would be eliminated and no offer was made by the Respondent to bargain with the Union concerning its elimination.

Apparently in response to being informed of that letter, on February 16, Alcoff wrote to administrator Mervine requesting bargaining concerning the Respondent's "proposal to eliminate" the BIP, reminding him that the Employer could not implement a new policy until bargaining has taken place. Alcoff's reference to the Respondent's "proposal" was not to any actual proposal the Employer made to the Union to eliminate the BIP since there was no evidence that the Respondent made such a proposal and no bargaining sessions were conducted after November, 2005.

At hearing, it was stipulated that the Respondent eliminated the BIP on or about March 1, 2006. However, the Respondent disputes whether the Baylor nurses were part of the unit. In addition, Jasinski testified that the BIP was not work-

[10] The Fund is managed by a Board of Trustees. One half of trustees are designated by the Employers and one half are designated by the Union.

[11] During the negotiations, the Respondent gave the Union a document listing the names of the eight employees. They were hired between November, 2001 and February, 2005.

ing – there were too few nurses in the program to fill the schedules.

The BIP is not specifically referred to in the expired collective-bargaining agreement, but, according to Alcoff, it was the practice of the Respondent to have such an arrangement for certain nurses before and during their current negotiations. Alcoff stated that the Respondent never proposed during negotiations that the BIP be eliminated. However, according to Alcoff, if the Baylor nurses were late to work they lost some of their premium pay for that shift. Alcoff complained, in negotiations, about that forfeiture.

3. Access by union agents to the facility

The expired collective-bargaining agreement provides in relevant part:

> Article 5—Visitation
>
> A. Upon entering the facility, the Union Organizer or the Union's designees shall notify the Administrator or his designee of their presence in the building. The Union Organizer shall have admission to all properties covered by this Agreement to discharge their [sic] duties as representative of the Union provided it is done in non-work areas and on non-work time and does not interfere with the operations of the facility.
>
> D. The Union shall be permitted to conduct Union meetings on the Employer's premises provided such meeting is conducted in Non-patient area and attended by employees during non-work time. The Union must notify the Employer in advance and shall not interfere with the operations of the facility.

Alcoff testified that when he visited the Respondent's premises to attend the four bargaining sessions from August 12 through November 29, 2005, he did not call in advance.

He also visited the premises an additional eight times during that period of time. He stated that when he entered the facility he announced himself at the reception desk and proceeded to the break room where he spoke to the workers. He testified that no advance permission or notification was required and he did not give such notice.

Alcoff stated that in about February, 2006, after Atrium purchased the facility, he entered the building and was stopped by administrator Mervine who told him that the employees did not want him in the building. Alcoff asked to speak to them anyway. Mervine agreed and Alcoff met for one hour with the workers.

Alcoff further stated that about one week before July 20, 2006, flyers were distributed to the workers and were posted in the facility announcing a Union meeting in the break room on July 20. The agenda included a review of the pending charges and complaint, and the Union's bargaining position. He entered the break room without having given advance notice to the Respondent that he would be visiting that day. Director of Nursing Deborah Hicks approached and told him that he was not permitted in the break room because he did not receive permission to be present, adding that he had to give advance notice. Alcoff protested that in the past no advance notice had been given. Hicks called the police and Alcoff left before they arrived. The police officer told Alcoff to leave. Alcoff responded that he wanted to deliver some literature. The officer asked him to call an employee to come outside to receive them and that was done.

Alcoff testified that in early August, 2006, he and Marvin Hamilton, a Union representative were passing by the premises and decided to try to speak to any employees who might be in the break room. Alcoff did not have a meeting with employees scheduled that day. They entered the building, announced themselves at the front desk and went to the break room. Nursing Director Hicks entered and told Alcoff that he did not have permission to be there, was not permitted on the premises and that she would call the police. Alcoff left.

ANALYSIS AND DISCUSSION[12]

I. GENERAL PRINCIPLES

It is a violation of Section 8(a)(5) of the Act for an employer to refuse to bargain collectively with the representatives of its employees. Section 8(d) defines the obligation to bargain collectively as the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

The Board has long held that "when, as here, parties are engaged in negotiations [for a collective-bargaining agreement], an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *NLRB v. Katz*, 369 U.S. 736 (1962); *Pleasantville Nursing Home*, 335 NLRB 961, 962 (2001), citing *Bottom Line Enterprises,* 302 NLRB 373 (1991). An employer violates Section 8(a)(5) and (1) of the Act by implementing its final bargaining proposals without reaching a bargaining impasse. *Cotter & Co.*, 331 NLRB 787, 787–788 (2000). The Board has recognized two limited exceptions to this overall impasse rule: "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt action." *Bottom Line*, above.

The Respondent argues that an impasse in bargaining was reached.

II. WAS IMPASSE REACHED

In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." As later set forth in *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973), the Board stated:

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[12] The arguments made and the applicable law in *Laurel Bay Health & Rehabilitation Center*, JD(NY)-26-07, decided by me, are similar to those involved here. I have excerpted some of the language in that decision but my analysis and findings as to the alleged violations here are based solely on the facts in this case.

> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

It is important to note that both lead cases, *Taft* and *Hi-Way Billboards*, use the term "good faith" in defining the attitude which parties must bring to the bargaining table. As set forth below, and in considering all the facts in this case, I must conclude that the Respondent did not approach the bargaining in good faith and thus did not meet that threshold requirement.

The burden of demonstrating the existence of impasse rests on the party claiming impasse—here the Respondent. *Serramonte Oldsmobile, Inc.,* 318 NLRB 80, 97 (1995). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are the "bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft,* above at 478.

A. The Factors

1. Bargaining History and the Length of the Negotiations

Regarding bargaining history, the Employer's predecessor Princeton and the Union's predecessor have been parties to successive collective-bargaining agreements for a number of years during which time Jasinski represented the Respondent. A contract extension agreement was executed during these negotiations.

Regarding the length of negotiations, although eight bargaining sessions were held, no bargaining of substance occurred and no agreements on any material terms were reached at the first three meetings, except that the Respondent agreed to certain minor changes in the language contained in the Union's proposed contract, such as a change in the Union's address. The parties presented their full economic proposals at the fourth meeting on July 7 at which the Union withdrew its demand for contributions to the Legal Fund and the Respondent agreed to certain of the Union's proposed discipline and discharge provisions. The final four meetings produced no agreement other than the Union's agreement to the Employer's grievance and arbitration proposals.

2. Good faith

The parties' good faith in negotiations has been subject to question on both sides. The complaint alleges that the Respondent's bargaining has not been in good faith, and the Respondent questions the Union's good faith intent to reach agreement. It raises several contentions in support of its argument that the Union bargained in bad faith. The Union (a) appointed inexperienced bargainers Pimplaskar and Foley, gave them no authority to reach agreement and that they acted as they did in order to "stall" the negotiations until the Tuchman agreement, containing the most-favored-nations clause, was concluded (b) stated that certain terms were not negotiable and maintained fixed bargaining positions on important terms of the agreement (c) made regressive offers and (d) ignored the fact that a majority of the employees did not want Alcoff to represent them in bargaining.

Machado, a former official of the Union, testified that prior to the 2005 negotiations she was told by Alcoff that its strategy would be to demand certain standards and not deviate from them because of the most-favored-nations clause in the Tuchman contract. She quoted Alcoff as saying that the Union "could not settle a contract" unless the Benefit Fund standards, among others, was met.

Alcoff denied Machado's testimony and credibly testified, without contradiction, that six other nursing homes whose contracts were negotiated in 2005, were not covered by the Benefit Fund. In this respect I cannot credit Jasinski who testified that Alcoff stated during the negotiations that he could not deviate from the terms of the Tuchman contract because the most-favored-nations clause in that contract prohibited the Union from giving the Respondent more favorable provisions.

Further, Machado's testimony that Alcoff said that if the Union's goals could not be achieved he would seek to "destroy" the employers is suspect. Clearly, it would not be in the Union's power or interest to eliminate a source of employment for unit employees. In this respect, Machado is not credited. She has ample reason to testify adversely to Alcoff and the Union. She was a trusted Union official until she unsuccessfully ran against incumbent president Silva and was then discharged. She appealed the election results and was owed money by the Union. She claimed that the Union could not be trusted and formed a rival union which filed a petition to represent the employees of the Respondent, accusing Silva and Alcoff of conducting a fraudulent election and taking away employees' health and legal benefits. Accordingly, it may be said that her testimony was affected by her adverse interest to Alcoff and the Union.

However, even if Machado's testimony is credited, the Union's alleged strategy, set forth prior to the beginning of the negotiations was certainly subject to change as the bargaining proceeded. Indeed, the Union's witnesses credibly testified that they began negotiations with certain "goals" in mind, which they sought to achieve, if possible, but not to the point of insisting, to impasse, on them.

Accordingly, even though the Union's position remained essentially the same on the issue of the Benefit Fund contributions until the last session on November 29, Alcoff expressed a willingness to present another proposal at the next, December 2 meeting. Significantly, Alcoff offered, in November, 2006, to consider health benefits other than those provided by the Benefit Fund. Accordingly, the Union's position may have changed. Unfortunately, the parties did not meet after their final, November 29, 2005 meeting.

New circumstances, including the fact that there was a new employer, Atrium, in the picture, may have been sufficient to create some movement in the Union's position. "An impasse is easily overcome by any number of changed circumstances. Thus, even assuming that a genuine impasse existed … the union's . . . letter advising Respondent that it

had new proposals to submit and requesting resumed negotiations constituted such a change, obliging respondent to return to the bargaining table." *Beverly Farm Foundation*, 323 NLRB 787, 793 (1997). Here, Alcoff offered to present a new proposal at the December 2 session, later offered to consider a different health plan, and offered to continue bargaining. In addition, during the course of the bargaining, proposals and alternative proposals were presented by the Union regarding the Benefit Fund. This demonstrates that the Union was not inflexible in its attitude toward that issue. Alcoff's good faith is also enhanced by his credited testimony, supported by two written requests, that he sought a mediator to assist in the negotiations.

Regarding wages, the Union's first offer on July 7 was for a 16% increase over three years with an 8% raise in the first year which included a purported 4% reopener increase. The Union's next demand, made on August 12, was for a total of 12% with a 3% first year increase. On August 25, the Union made a 16% total demand with 7% in the first year. The Respondent terms this course of conduct "regressive" and evidence of the Union's bad faith. However, it must be noted that the Union was representing an aggressive, vocal employee complement which was also a dissident group seeking to undermine its representative status. This group believed that it was entitled to a 4% reopener increase as well as raises in the contract being negotiated. Under these circumstances, the Union attempted to adjust its demands to the desires of the workers. Thus, its initial first year demand of 8% included the supposed 4% reopener raise. The next demand removed the 4% raise and demanded only a 3% raise in the first year if the Respondent accepted its "package" proposal. When the Employer did not, the Union's final demand was for a 7% raise in the first year, however accompanied by reducing its benefits demands for items such as holidays, vacation, sick day and contributions to other funds. In addition, there was room for negotiation following the final bargaining session on November 29 and the Union offered to continue bargaining.

The Tuchman agreement provided for a total of 12% raises in wages over the three year term of the contract, with a 3% raise in the first year. The Union's various offers as to wages shows that its position on this term was not unalterably fixed to the Tuchman contract. Rather, the Union sought to address the employee's concerns here as to their perceived entitlement to the make-whole 4% increase while at the same time offering a package without such an increase. Accordingly, the Union did seek to address the needs of employees, as the Respondent insisted it must do, rather than adhere to the wage provisions of the Tuchman contract.

The Respondent further asserts that the Union's bad faith is demonstrated by its alleged rejection of employees' concerns and abandonment of them. Its answer to the complaint asserts that the Union was "no longer the designated collective-bargaining representative of the employees." The Respondent also argues that the Union displayed "contempt" for the employees because of their support for Machado in the internal union election, by not consulting with unit members during negotiations, trying to unilaterally replace the bargaining committee, and by the Union's not sending ballots in the internal union election to the unit employees.

It points to the three employee petitions dated September 7, 2005 in which 30 employees stated that they no longer wanted to be represented by the Union and were voting the Union "out" of the Employer. However, no decertification petition or employer's petition was filed. On January 2 and 30, 2006, employees petitioned to have Alcoff removed from the negotiations, asking that a Union lawyer be present at the bargaining.

These claims have no merit, and they are no defense to the Employer's refusal to bargain. The fact that employee petitions were circulated in which they sought to remove Alcoff as the chief bargaining representative is irrelevant to the issue of the Union's good faith. Alcoff explained that he was focused on his obligation to bargain with the Employer and not on whether an attorney should represent the Union. The Union remained the recognized, exclusive bargaining representative of the employees. Alcoff was appointed by the Union's president to represent the interests of the workers during the negotiations. The evidence demonstrates that a large employee contingent was present at all the sessions, that Alcoff met with them prior to commencing each bargaining session, and that during the course of the bargaining Alcoff took into consideration their opinions concerning the reopener wage increase and other subjects up for discussion.

3. The importance of the issue preventing agreement

Regarding the most important term of the proposed agreement and the term which represented the most controversy, the Benefit Fund, the Union's first proposal demanded a contribution in the amount of 21% of gross payroll with a cap of 24%. Its second proposal, made on July 7, called for an increase of 22.33% with no written cap. This represented an increase of about $185,000 in contributions from the Employer's current payment of 13% of gross payroll.

The Union's August 12 "package" offer demanded a payment of 22.33% which was capped at that rate. The Respondent offered a 16% increase in the Benefit Fund.

The Act does not require a union to agree to an employer demand, or that it modify its offers in any certain way. All that is required is a good faith effort to reach agreement. The evidence demonstrates that the Union modified its demand for payments to the Benefit Fund during the course of negotiations, although in a very minor fashion. That does not mean that the Union would not deviate from the terms that it offered. There were back and forth negotiations over these terms during the bargaining sessions. Further meetings could result in further discussions and a change in the Union's position, and in fact it offered to present a modified proposal at the December 2 scheduled session but the Respondent cancelled that meeting. Further, it offered to consider a different health plan. However, the Union was thwarted by the Respondent in its attempts to arrange future bargaining sessions.

Impasse over a single issue may create an overall bargaining impasse that privileges unilateral action if that issue is "of such overriding importance" to the parties that the im-

passe on that issue frustrates the progress of further negotiations. *Calmat Co.,* 331 NLRB 1084, 1087 (2000). However, if impasse occurred, it was broken when Alcoff offered to present another proposal at the December 2 session. That session did not take place because Jasinski believed that it would not be productive.

In this regard, when considering the issue of good faith, it must be emphasized that the Union's efforts to arrange bargaining sessions after the final November 29 session were fruitless as the Respondent unlawfully engaged in delaying tactics and failed to meet on any of the numerous dates offered by the Union.

The Respondent's other violations of the Act, as set forth herein, most notably refusing to furnish information which may have been helpful in the Union's preparing further offers, bypassing the Union and dealing directly with its employees, changing its health insurance plan without bargaining, and terminating the BIP and changing the access rights of the Union, illustrates that it was the Respondent's lack of good faith, rather than the Union's, that resulted in a lack of meaningful bargaining which precluded a finding that impasse was reached.

4. The parties' understanding as to the state of negotiations

Regarding the Respondent's claim that it made a "final offer" at the August 25 session, I cannot credit the testimony of Jasinski or employees Plummer and Dieujuste that Jasinski made that statement. Dieujuste supported Machado in the Union election for president against incumbent president Silva, was a member of her campaign committee, prepared two employee petitions which sought to have Alcoff removed as negotiator, filed a charge against the Union alleging that it violated its duty of fair representation, and signed a Board petition in which a rival union, for which she is a delegate, sought to represent the employees of the Employer. Further, she denied receiving the dismissal letter of the charge she filed, and unconvincingly denied receiving any information concerning the charge after she filed it. Accordingly, Dieujuste's testimony may have been affected by her alliance with a rival union and connection with Machado in opposition to the Union and Alcoff.

A further reason exists for rejecting Jasinksi's claim that he announced that he made a final offer. On August 30, Alcoff sent a letter modifying the Union's proposals. Clearly, if the Respondent had made a final offer on August 25, it would be incumbent on the Union to accept or reject it, not make an additional proposal. Further, Jasinski's letters of October 4 and November 16 made no mention of the alleged final offer. Similarly, at the November 29 session, Jasinski did not announce that he had made a final offer. It was only the following day, November 30, that he wrote that he had presented the Employer's final offer three months earlier.

Indeed, on November 30, Jasinski offered to meet with the Union if it makes a "meaningful contract proposal." Accordingly, the Employer believed that further negotiations would be fruitful. Such statements support a finding of no impasse. *Ead Motors Eastern Air Devices*, 346 NLRB 1060, 1064 (2006); *Duane Reade, Inc*., 342 NLRB 1016, 1017 (2004).

"For impasse to occur, both parties must be unwilling to compromise." *Grinnell Fire Protection Systems Co*., 328 NRLB 585, 585 (1999) or believe that further proposals could no longer be fruitful. *Huck Mfg. Co. v. NLRB*, 693 F.2nd 1176, 1186 (5th Cir. 1982); *Larsdale, Inc.*, 310 NLRB 1317, 1318 1993). "Impasse can exist only if both parties believe that they are 'at the end of their rope.'" *Cotter & Co*., 331 NLRB 787, 788 (2000). Thus, there must be a contemporaneous understanding by both parties that they had reached impasse. *Essex Valley Visiting Nurses Assn.,* 343 NLRB 817, 841 (2004). Here, the Union believed that the parties were not at impasse and so advised the Respondent in writing.

In *Cotter & Co*., 331 NLRB 787, 788 (2000), in finding that no impasse had taken place, the Board noted that prior to the employer's declaration of impasse, there had been movement on important issues and the union had demonstrated flexibility. Here, the Union made a written modification of its offer on August 30, and offered to present another proposal at the December 2 session, and in view of the parties' agreement, on November 29 and thereafter to meet again, it appears that the "contemporaneous understanding" of the parties at that time regarding the state of the negotiations weighs against a finding that a valid impasse was reached. *Newcor Bay City Division*, 345 NLRB 1229, 1240 (2005). In light of the Union's willingness to continue bargaining I cannot find that the parties had reached a deadlock on the issue of the Benefit Fund. Whether the parties could be expected to resolve their differences is unknown. What is known is that the Union offered, and the Respondent agreed to continue to bargain. Although the Respondent believed that there was an impasse the Union did not. Accordingly, there was no contemporaneous understanding by both parties that they had reached impasse.

J.D. Lunsford Plumbing, 254 NLRB 1360, 1364–1365 (1981), and *Richmond Electrical Services*, cited by the Respondent, may be distinguished in that the unions in those cases refused to accept any terms different than standard, area contracts and in *Richmond*, the union conceded that the most-favored-nations clause precluded it from agreeing with the employer on a lower wage than the one in the industry-wide agreement. Here, however, the Union modified the terms of the Tuchman Benefit Fund amounts, and offered various wage terms which differed from that agreement.

"It is well settled that parties have a continuing obligation to bargain even though they have reached a lawful impasse." *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1017 (2006). The Supreme Court stated in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982):

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." . . . Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." . . . Hence, "there is little warrant for regarding an impasse as a rupture of the bar-

> gaining relation which leaves the parties free to go their own ways."

As the court stated in *Taft*, "although some bargaining may go on even in the presence of a deadlock, it is a "fundamental tenet of the Act that even parties who seem to be in implacable conflict may, by meeting and discussion, forge first small links and then strong bonds of agreement. . . . The Board's finding of impasse reflects its conclusion that there was no realistic possibility that continuation of discussion at that time would have been fruitful." *Television Artists v. NLRB*, 395 F.2nd 622, 628 (D.C. Cir. 1968). "Anything that creates a new possibility of fruitful discussion (event if it does not create a likelihood of agreement) breaks an impasse … [including] bargaining concessions implied or explicit." *PRC*, 280 NLRB 615, 636 (1986). Here, Alcoff's offer to make a new proposal on December 2, his offer to consider a different health plan, and his offers to meet thereafter certainly created a "new possibility of fruitful discussion."

In finding that no impasse occurred, the Board in *Newcor Bay City Division*, above, at 1240, observed that when the employer asserted that the parties were at impasse, the union agent asked to continue bargaining and assured the employer that it was prepared to negotiate. It was expected that the union would make concessions depending on what information the employer provided. The Board found that no impasse occurred even though the union "had not yet offered specific additional concessions, but only declared its intention to be flexible and continue bargaining." See *Ead Motors*, above, slip op. at 5. The Board also noted that although a "wide gap" existed between the parties' positions, no impasse occurred where there was a possibility of further movement on important issues. *Newcor*, above, slip op. at 10–11. Similarly, the evidence here shows that the Union officials were not at the end of their negotiating rope, but were ready and willing to negotiate further.

In *Serramonte Oldsmobile*, 318 NLRB 80, 98 (1995), as here, although at the final bargaining session "all the elements of a genuine impasse in bargaining were in place" here, Alcoff's offer to present a new proposal on December 2 represented "serious movement—a substantial effort" to bridge the gap in positions. Thus, Alcoff's statement signaled that movement was possible. That does not mean that the Union could be expected to change its position, but it is "realistically possible" that continued discussion would have been fruitful.

Similar to the instant case, in *Grinnell Fire Protection Systems Co.,* 328 NLRB 585, 586 (1999), the Board found that no impasse had occurred where the union had not yet offered specific concessions, but on the last day of negotiations had declared its intention to be flexible, and sought another bargaining session. "The essential question is whether there has been movement sufficient 'to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions.'" *Hayward Dodge*, 292 NLRB 434, 468 (1989). I find that such ray of hope presented itself at the last bargaining session here.

I thus cannot find that the Union's willingness to continue talks was a "mere token offer" made for the ulterior purpose of precluding the unilateral implementation of certain terms. *NLRB v. H & H Pretzel Co.,* 831 F.2nd 650, 656 (6th Cir. 1987) as argued by the Respondent. In that case the union did not make a new proposal or indicate a willingness to compromise further on any specific issue. Here, the Union offered to make a new proposal and meet again. See *Jano Graphics, Inc*., 339 NLRB 251, 251 (2003), where the Board found that any impasse that existed was broken when the union informed the employer that it had new proposals and was seeking further bargaining.

In *ACF Industries LLC*, 347 NLRB 1040, 1043 (2006), cited by the Respondent, the Board found that the union's request for information made after months of extensive bargaining and after its rejection of the employer's final offer was "purely tactical and was submitted solely for purposes of delay." Unlike here, the Board noted that no negotiations were scheduled and the union showed no interest in post-implementation bargaining.

> The mere fact that the Union refuses to yield does not mean that it never will. Parties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede at the outset. Effective bargaining demands that each side seek out the strengths and weaknesses of the other's position. To this end, compromises are usually made cautiously and late in the process. *Detroit Newspaper Local 13 v. NLRB,* 598 F.2nd 267, 273 (D.C. Cir. 1979).

It thus cannot fairly be said that by the end of the November 29 session or thereafter, the parties had exhausted all possibilities of reaching agreement. Accordingly, the Respondent's declaration of impasse and unilateral changes in its employees' terms and conditions of employment were premature and violated Section 8(a)(5) and (1) of the Act.

In addition to the above, "a legally recognized impass cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." *Newcor Bay City*, above, at 1241. In this connection, the Union's information requests of January 19 and June 20, 2006 have not been complied with. Particularly important was its January 19 request for information concerning the health plan implemented by the Respondent which replaced the Benefit Fund.

If information had been forthcoming regarding that plan, informed bargaining may have taken place concerning it and it is possible that the Union would have modified its offer insisting on the continuation of the Benefit Fund. Indeed, the Union later offered to consider an alternative plan to the Benefit Fund. In addition, the Union's June 20 request asking for updated information concerning the employees may also have led to more productive bargaining and the presentation of offers which could have led to an agreement. Inasmuch as none of the information was provided, the Union was prevented from making a further, informed offer based on the employees' current terms and conditions of employment.

I accordingly find and conclude that no impasse had been reached by the parties during or after their negotiations.

B. The Unilateral Changes

It has been held that if parties are engaged in overall contract negotiations which encompass mandatory bargaining subjects, the employer is obligated not only to give the union notice and an opportunity to bargain over the change, but also to refrain from implementation until impasse or agreement. *Indian River Memorial Hospital*, 340 NLRB 467, 468 (2003).

I have found above that the parties had not reached impasse in bargaining and accordingly the Respondent was not permitted to make the unilateral changes that it did.

A unilateral change in a mandatory subject of bargaining is permitted only if the union clearly and unmistakably waives its right to negotiate over the changes. See *Metropolitan Edison co. v. NLRB,* 460 U.S. 693, 708 (1983). The Court stated there that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corp.,* 330 NLRB 1363, 1365 (2000). No such showing has been made here.

The questions to be answered are (a) were material changes made to the employees' terms and conditions of employment (b) did the changes involve mandatory subjects of bargaining (c) did the Respondent notify the Union of the proposed changes and (d) did the Union have an opportunity to bargain with respect to the changes. I find below that the Respondent made material changes which involved mandatory subjects, and that it did not notify the Union of the changes or provide it with an opportunity to bargain concerning those changes.

1. The Change of the Health Insurance Plan

The complaint alleges that in January, Atrium changed the health insurance plan that covered unit employees' health claims without notice to the Union and without affording it an opportunity to bargain concerning the change. Health insurance is a mandatory subject of bargaining. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001).

As set forth above, the Benefit Fund terminated benefits for the Respondent's employees on December 1, 2005 because of a failure by the Employer to make contributions to the Fund. On December 22, the Fund informed the Respondent and the Union that if the parties reach agreement on a new collective-bargaining agreement providing for participation in the Fund effective December 1, 2005, and if the Employer presents reports of earnings for December, 2005, eligibility for health and welfare benefits through the Fund would be effective retroactively to December 1, 2005.

On December 27, 2005 and January 17, 2006, Jasinski wrote to Alcoff that the termination of benefits forced the Respondent to protect its workers by providing another health benefit plan which it "proposed and implemented" to mitigate any losses and protect its employees. Contrary to Jasinski's use of the word "proposed" there was no evidence that any proposal was made to the Union prior to the implementation of the new plan. Accordingly, I find that the Respondent did not propose to the Union that it intended to implement a new health benefit plan. In this connection, I credit Alcoff's uncontradicted testimony that the Respondent did not notify the Union prior to making the change and did not offer to bargain with it concerning the change.

One year later, in December, 2006, Jasinski wrote to Alcoff stating that the Union, at the direction of the Benefit Fund, terminated the health plan for employees, and that the Fund unilaterally changed the healthcare provider and decreased benefits. Jasinski stated that such action forced the Respondent to protect its workers.

The Respondent's answer to the complaint alleges certain affirmative defenses, including that the Union unilaterally modified the terms and conditions of the expired contract in violation of the Act. The Respondent argues that the Union terminated the health plan in order to force it to reach agreement on a new contract. It points to Fund director Wells' letter offering to reinstate the plan if agreement was reached on a new contract effective December 1, 2005 and if the Employer pays what it owes. From this the Employer asserts, as set forth in its December 27 letter, that the Union, at the direction of the Benefit Fund, terminated the health plan for employees, and the Fund unilaterally changed the healthcare provider and decreased benefits.

As proof of the domination of the Fund by the Union, the Respondent asserts, according to Jasinski's testimony, that a majority of the Fund's trustees were union trustees, that Silva was a trustee, that none of the employer trustees were New Jersey employers, and a Fund employee worked for a period of time in the Union's office in New Jersey. It further asserts that, based on Machado's testimony, Alcoff directed that all questions from employees concerning the Fund be directed to the Union's staff including the Fund employee stationed at the Union's office. Alcoff reasonably explained that he was told by the Fund that employees were calling Fund director Wells and other Fund employees with questions and complaints about their benefits and the Fund wanted one person to be responsible to answer such inquiries. The Fund rented space from the Union and a Fund employee worked there answering questions. Such conduct does not constitute evidence, as alleged by the Respondent that the Fund and the Union acted in concert to pressure the Respondent into signing the master agreement.

As Alcoff stated, the Union has no authority over the Benefit Fund. The Fund terminated benefits because of the Employer's admitted failure to pay its obligations to the Fund. Wells' letter had no relation to the bargaining undertaken by the parties. It just stated that benefits would be reinstated if agreement was reached by a certain date. *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929 (1984), cited by the Respondent, is inapposite. In that case the Board found that a union fund was an agent of the union where the fund administrator who was also the union president, had

actual authority from the fund's trustees to act in behalf of the union. There is no such showing here.

The Respondent defends its implementation of the new plan on the ground that due to the Fund's termination of benefits for its employees they were left without health insurance. In making this claim the Respondent is, in effect, arguing that it was faced with an "economic exigency" which required such action. No such showing has been made here.

The principle of economic exigency is usually applied to cases of dire financial emergency faced by the employer. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). It must be shown that the exigency was caused by "external events, was beyond the employer's control, or was not reasonably foreseeable." *RBE* at 82. The Respondent cannot show that any of those circumstances was present. Clearly, the termination of benefits by the Fund was caused by internal events – the Respondent's failure to pay its contractual contributions to the Fund. It was not beyond the Respondent's control since it could have made those payments. Further, the termination of the Fund's benefits was reasonably foreseeable since if payments to fund the plan were not made it is obvious that benefits would be terminated. Moreover, the employer seeking to use this defense must give adequate notice and an opportunity to bargain with the union and bargain to impasse over the matter. *RBE* at 82. The Respondent has not met any of those requirements.

While it is laudable for the Respondent to arrange to have its employees covered by a health benefit plan when the Benefit Fund terminated their coverage, its action was nevertheless unlawful. It could have offered to bargain with the Union concerning the new policy but it did not. In addition, the implementation of the new plan would not have been necessary if the Respondent had made its contributions as it was legally required to. In identical circumstances, in *Park Maintenance, et al.,* 348 NLRB No. 98, slip op. at 10 (2006), where a union benefit fund terminated the health plan it had with an employer and the employer placed its employees in its own plan, the Board found a violation since the employer had not offered to bargain with the union about the change.[13]

I accordingly find and conclude that the Respondent violated Section 8(a)(5) of the Act, as alleged, by changing its health insurance plan without prior notice to the Union and without affording it an opportunity to bargain with Atrium regarding this conduct and the effects of this conduct. The standard remedy for unilaterally implemented changes in health insurance coverage includes the restoration of the status quo ante regardless of whether such a requirement is "necessary or possible." *Larry Geweke Ford*, 344 NLRB 628, 628 (2005).

2. The Baylor incentive program

The complaint alleges that on about March 1, 2006, Respondent Atrium eliminated the Baylor Incentive Program without prior notice to the Union and without affording it an opportunity to bargain with Atrium regarding this conduct and the effects of this conduct.

As set forth above, the Respondent stipulated that it eliminated the BIP on or about March 1, 2006. The BIP was an arrangement whereby the nurses worked on Saturday and Sunday each week, totaling about 32 hours per week but were paid for 40 hours. The notice sent to the nurses advised them to speak to the director of nursing about "other options." Accordingly, it is apparent that the nurses' working conditions—their hours and wages were changed.

The Board has long held that "an employer violates Section 8(a)(5) when it makes a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining, at a time when unit employees are represented by a union, and in the absence of an impasse in bargaining. Even where a change resulted directly from a permissible, preelection or managerial decision concerning the scope of the business, the employer is required to bargain over the change as an effect of that decision." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 fn. 15 (1981); *Fresno Bee*, 339 NLRB 1214 (2003).

The General Counsel has established a prima facie violation by showing that the Respondent changed the terms and conditions of employment of the Baylor nurses by eliminating the BIP. The evidence establishes that their wages and hours, mandatory subjects of bargaining, were changed by the notification to them that the BIP would no longer be offered and they were advised to discuss other options with management.

I credit Alcoff's uncontradicted testimony that the Respondent did not offer to bargain with the Union concerning the termination of the BIP. In fact, upon learning that the program would be eliminated, Alcoff, on February 16, requested bargaining concerning its termination. No bargaining took place as to this matter.

Whether Alcoff may have objected to the nurses' higher salaries is irrelevant to the question here which is whether the Respondent made a material and substantial change in a term of employment without negotiating with the Union. I find that it did.

In defense, the Respondent argues that (a) impasse in bargaining had been reached (b) the decision to eliminate the BIP was lawful in that there were too few nurses in the program for it to operate properly (c) the Baylor nurses were not part of the unit (d) the BIP is not mentioned in the collective-bargaining agreement and (e) the expired contract's management rights clause permitted this change. First, as set forth above, I find that no valid impasse was reached in bargaining. Second, regardless of whether the decision to eliminate the program was a lawful economic decision, the Respondent still had an obligation to bargain about such a material change. *First National Maintenance*, above. In addition, the evidence is clear that the Baylor nurses were licensed practical nurses which are part of the contractual unit. In addition, although the terms of the BIP were not specifically set forth in the contract, "an employer's established past practice can become . . . . an implied term and condition of employment. Any unilateral change in an implied term or

[13] It should be noted that no exceptions were filed to the judge's finding of that violation.

condition of employment violates Section 8(a)(5) and (1) of the Act. *Finch, Pruyn & Co.,* 349 NLRB 270 fn. 31 (2007). Here, I credit Alcoff's testimony that it was the practice of the Respondent to have such an arrangement for certain nurses before and during their current negotiations. Accordingly, the BIP was an established past practice which had become an implied term and condition of employment.

Finally, it is well settled that a "contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of evidence of the parties' contrary intentions." *Long Island Head Start Child Development Services*, 345 NLRB 973, 973 (2005); *Blue Circle Cement Co.,* 319 NLRB 954, 954 (1995); *Paul Mueller Co*., 332 NLRB 312, 313 (2000). There is no evidence in the expired contract or elsewhere that the parties intended the management rights clause to survive the expiration of the agreement. Accordingly, the Respondent may not rely on the management rights clause in the expired contract to justify its unilateral changes.

Even assuming that the management rights clause survived the expiration of the contract, a unilateral change in a mandatory subject of bargaining is permitted only if the union clearly and unmistakably waives its right to negotiate over the changes. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). The Court stated there that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corp.,* 330 NLRB 1363, 1365 (2000). No such showing has been made here.

I therefore find and conclude that Respondent Atrium violated Section 8(a)(5) of the Act as alleged by eliminating the Baylor Incentive Program without prior notice to the Union and without affording it an opportunity to bargain with Atrium regarding this conduct and the effects of this conduct.

3. Access by the Union to the facility

The complaint alleges that since on about July 20, 2006, Atrium changed the access right of Union representatives to its facility for the purpose of meeting with unit employees to more effectively represent them, by denying Union representatives such access rights.

The Board has held that contractual provisions setting forth a union's right of access to an employer's facility survive the expiration of the collective-bargaining agreement. *Gilberton Coal Co.,* 291 NLRB 344, 348 (1988); *Scott Bros. Dairy*, 332 NLRB 1542 fn. 2 (2000); *T.L.C. St. Petersburg,* 307 NLRB 605, 610 (1992). Accordingly, the question is whether the Union's actions conformed to the contractual provisions and whether the Respondent unlawfully excluded it from its premises.

As set forth above, a Union meeting was scheduled for July 20 at the facility. Flyers were posted prior to that time advertising the event. Alcoff admittedly entered the facility without having given advance notice to the Respondent and he was asked to leave. According to Article 5-D of the contract, the Union is required to notify the Respondent in advance of Union meetings. Alcoff admittedly did not do so.

There was no evidence that Alcoff was permitted to hold pre-scheduled Union meetings prior to this time without advising the Respondent in advance. The pre-scheduled collective-bargaining sessions which were immediately preceded by a Union meeting between Alcoff and employees did not require advance notice since the Respondent had been given advance notice of the sessions. I accordingly find that no violation occurred in the Respondent's denying access to Alcoff for the conduct of the meeting on July 20 where the Respondent was not notified in advance as required by the contract. The mere fact that flyers were posted did not constitute the contractually required advance notice.

I credit the uncontradicted testimony of Alcoff that in August, 2006, he and agent Hamilton entered the facility, announced their presence to the receptionist and walked to the employee break room to attempt to speak with employees in this spontaneous, unplanned, unscheduled visit. They were asked to leave. Article 5-A permits a Union agent to enter the facility to discharge his duties as a union representative. The only requirement is that upon entering the facility he notify the administrator or his designee of his presence. Alcoff gave uncontradicted testimony that in the past, in an identical fashion, he announced himself to the person at the receptionist desk and proceeded to the break room and spoke to employees without interference from the Employer.

I find that Alcoff satisfied the requirements of Article 5-A by telling the receptionist of his presence. Article 5-A does not require the administrator to give his approval of Alcoff's presence. It just demands that the union agent notify him or his designee of his presence and that thereafter he shall have admission to the facility. Alcoff followed his past practice by notifying the receptionist of his presence in August, 2006. There was no evidence that the receptionist was not the administrator's designee. I accordingly find and conclude that the Respondent unlawfully denied access to Alcoff in August, 2006.

III. THE ALLEGED DIRECT DEALING WITH EMPLOYEES

The complaint alleges that on about August 24, 2005, Princeton bypassed the Union and dealt directly with its employees by making a contract proposal to them before the proposal was made to the Union.

This allegation relates to the Employer's August 24 letter to employees and family members of the residents referring to a planned job action by the Union six days later. While the letter sought to reassure that the residents were "taken care of," it also informed the reader that it was blameless since it proposed a new contract which included wage increases totaling 12%, contributions of 16% to the Benefit Fund, paid vacation, holidays and sick days, but the Union "flatly rejected our proposal. Instead, they are insisting that we agree to a contract that was agreed to by other Employers who are in a different situation than we are in."

Although Jasinski stated that the purpose of the letter was to "calm" the family members as to the safety of the residents and to advise them of the Respondent's position in the bargaining, that position had not yet been presented to the Union. In fact, the Respondent's outstanding offer at that time was for a 7% wage raise over three years. Although the Respondent offered a 12% wage raise at the next meeting which was one day after the letter was issued, that offer was not made to the Union prior to the letter being sent.

> It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees. An employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1). *Armored Transport, Inc.,* 339 NLRB 374, 376 (2003).

In *Armored Transport*, above, the Board found that the employer violated its duty to bargain with the union by handing its employees a bargaining proposal and later the same day sending the union the same proposal. Similarly to the instant case, the employer disparaged the union. In that case the employer suggested that the employees demand a new election and encouraged them to reject the union. Here, the Respondent disparaged the Union by incorrectly informing its employees that the Union rejected a proposal, whereas that proposal had not been made prior to that time. In addition, the Respondent undermined the Union by stating that it insisted that it sign a contract agreed to by other employers.

An employer may communicate its bargaining position to its employees, but here, as in *Armored Transport*, the Respondent sought to undermine the Union's status and disparage it in the eyes of its employees by presenting a contract proposal to them before it presented it to the Union and by stating, with no basis, that the Union had rejected that proposal. See also *Detroit Edison Co.,* 310 NLRB 564, 565 (1993) where the Board found unlawful direct dealing with employees in the employer's communicating a contract proposal to them prior to its presentation to the union.

IV. THE ALLEGED BAD FAITH BARGAINING

The complaint alleges that from about August 25, 2005 to about December 9, 2005, Princeton failed and refused to bargain with the Union over a successor collective-bargaining agreement by engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates it had proposed to bargain, and by unreasonably failing and refusing to meet on nearly all of those dates. The complaint alleges that Atrium, which admittedly became the successor to Princeton on or about December 9, 2005, committed the same violations beginning on about December 9, 2005.

There was no evidence that the Respondent cancelled any bargaining sessions prior to August 25, or unlawfully failed to meet with the Union. Thus, the parties met for bargaining on February 24, 2005, in March, June 8, July 7, August 12, 17, and 25. There were thus seven sessions in seven months. Unfortunately, matters changed thereafter with the Respondent exhibiting little interest in meeting and in fact cancelling scheduled bargaining sessions.

Thus, as set forth above, on August 30, 2005, Alcoff asked Jasinski to suggest available dates for bargaining, and not hearing from him, on September 30 offered eight days in October. Jasinski did not respond. At hearing, Jasinski did not recognize and could not recall receiving the letter, but wrote to Alcoff on October 4, stating that he was not available to meet on any of the dates in Alcoff's September 30 letter, but offering to meet in the week of October 25. By letter of October 10, Alcoff agreed to meet on October 26-28, but when Alcoff called to confirm a meeting date, Jasinski's office said that he was not available to meet. A new session was scheduled for November 2 or 3, but Jasinski cancelled that session because he was not available, but according to the credited testimony of Alcoff, Jasinski did bargain with him about a different employer on one of those dates, and was therefore available to bargain in behalf of the Respondent.

On November 14, suggested five dates in November and ten dates in December. Jasinski agreed to meet on November 29 and December 2. They met on November 29 at which Alcoff inquired about an alleged new owner and asked Jasinski to respond at the December 2 meeting. On November 30, Jasinski cancelled the December 2 meeting unless Alcoff made a "meaningful contract proposal," but asked Alcoff to propose other dates.

On December 9, Atrium became the admitted successor to Pavilions. The new employer's delaying tactics continued as before.

On January 19, 2006, Alcoff offered all dates in February, but none were acceptable to Jasinski. On April 11, Jasinski conditionally offered to meet in late April or early May "provided that Alcoff represents the employees." Nevertheless, on May 10, Jasinski stated that he had no objection to meeting with Alcoff or other representative designated by the Union.

Alcoff wrote on May 15, offering to meet between June 5 and 15. Jasinski agreed to meet on June 12. Alcoff cancelled that session because of his unavailability due to the counting of ballots in the internal union election, and because of the lack of cooperation of the Union's agent in providing the names of employees who would attend the meeting. Jasinski made much of the Union's cancellation of this meeting. It asked that the charges be dismissed, asserting that Alcoff and the Union have repeatedly refused to meet and bargain, and also filed a charge, later dismissed, alleging that the Union violated its duty of fair representation by campaigning for a candidate instead of representing employees.

On June 20, Alcoff offered all dates from July 10 through the end of July. None were accepted by Jasinski. On July 10, Jasinski asked Alcoff to propose dates for bargaining. Alcoff responded by letter of July 17, offering to meet on four dates in July and on August 1. Again, none of the dates was agreed to by Jasinski.

On October 23, Jasinski wrote that he was willing to attend further bargaining sessions. Alcoff replied that he could meet during two weeks in mid-December but wanted infor-

mation he had previously requested. Jasinski did not agree to meet during those two weeks. Jasinski wrote on December 27, offering to meet during the weeks of January 2 or 8, 2007. Alcoff replied on January 9, having just returned from vacation, that he was available during the week of January 29. Jasinski replied, but did not address Alcoff's request to meet and no meeting was held. It does not appear that the parties met for bargaining at any time thereafter.

Based on the above, the evidence is quite clear that the Respondent, as alleged, failed and refused to bargain by engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates it had proposed to bargain, and by unreasonably failing and refusing to meet on nearly all of those dates. The Union used its best efforts to attempt to meet with the Employer but to no avail. It wrote to Jasinski numerous times requesting a wide range of dates that it was available to bargain. When Alcoff proposed dates for meeting, invariably Jasinski either did not respond or did not agree. When a meeting was agreed to, the Employer cancelled the meeting, for example, in early November and on December 2, 2005. Further, Jasinski occasionally wrote to Alcoff asking him to propose dates to meet, such as on November 30, 2005, July 10, and October 23, 2006 but not himself offering any dates that he was available, thus leaving open the possibility, which he seized upon, to reject the dates chosen by Alcoff.

In addition, Jasinski's refusal, for one month, from April 11 to May 10, to meet with the Union until Alcoff demonstrated that he represented the employees is further evidence of the Respondent's unlawful dilatory tactics. Notwithstanding the employee petitions concerning Alcoff's representative capacity, it is the Union, and not the employees, which chooses the bargaining representative. It has long been held that "employers and unions have the right 'to choose whomever they wish to represent them in formal labor negotiations." *General Electric Co. v. NLRB*, 412 F.2nd 512, 516 (2nd Cir. 1969). Parties must deal with the chosen representatives who appear at the bargaining table except in the rare circumstance when the "presence of a particular representative … makes collective bargaining impossible or futile." *Fitzsimons Mfg. Co.,* 251 NLRB 375, 37J9 (1980).

Incredibly, Jasinski seized upon Alcoff's sole cancellation of a meeting, June 12, to ask for dismissal of the charges on the basis that the Union "repeatedly refused to meet and bargain." Nothing could be farther from the truth. It was clearly the Respondent that has engaged in such conduct. Jasinski's lack of good faith is amply demonstrated in the course of events which followed. While accusing the Union of repeatedly refusing to meet, he did not accept any of the dates thereafter offered by the Union – July 10 through the end of July, one day in August, two weeks in December, and the week of January 29.

Jasinski's credibility is further harmed by his failure to recall receipt of the Union's September 30 letter in which Alcoff offered certain dates for bargaining, but then admitting sending a letter on October 4 in reply to the September 30 letter.

The Board has held that an employer's "pattern of delay" is evidence of its violation of its Section 8(d) obligation to meet with the Union at reasonable times for the purposes of collective bargaining. In *Calex Corp*., 322 NLRB 977 (1997), the parties met for 19 sessions in the 15 months following the union's certification, and the employer cancelled a number of scheduled meetings. Here, the record of the Respondent's failure to reply to offers to meet, failure to suggest dates for meeting, and cancellations of meetings establish, and I find and conclude, that it has refused to meet and bargain with the Union in violation of its obligation under Section 8(a)(5) the Act.

V. THE FAILURE TO FURNISH INFORMATION TO THE UNION

The complaint alleges that on January 19, June 20 and July 17, 2006, the Union requested certain relevant information, and the Respondent failed and refused to furnish it.

As set forth above, on January 19, 2006, Alcoff wrote to Jasinski, asking for a copy of the summary plan description of the new health plan implemented by the Employer, the total premium costs, the costs to employees to obtain coverage under the new plan, and the number of employees who are covered under the new plan. These documents were requested because Alcoff had just learned that the Respondent implemented a new health benefits plan for its employees, and it sought to bargain about this change.

On June 20 and July 17, 2006, Alcoff asked for an updated list of all unit employees by job classification, including their name, address, social security number, job title, date of hire, wage rate, shift, etc., since January 1, 2006; copies of correspondence to employees since December 1, 2005 regarding terms and conditions of employment; copies of personnel policies or the employee handbook that was changed since December 1, 2005; summary plan descriptions of insurance plans offered to employees; cost to the employer and the employees of insurance plans; gross bargaining unit payroll from January 1, 2006 through May 31, 2006; and a summary of the policies and benefits offered to the "Baylor Nurses."

These documents were requested because of the purchase of the facility by a new owner, Atrium. Alcoff sought to determine what changes the new owner made in its employees' terms and conditions of employment as of the time of the new ownership. Alcoff testified that this was the first time he requested copies of correspondence and copies of the personnel policies, handbook and payroll, and he sought the information for the periods set forth because the new owner purchased the facility in December, 2005. His further reasons for seeking the data were that he heard from employees that there were changes in their terms and conditions of employment including their dates of hire and their accruals of paid time off.

I credit Alcoff's uncontradicted testimony that none of the information requested was provided to the Union, and the Respondent has not shown that it had, in fact, provided the information requested in the Union's letters of January 19, June 20, and July 17.

The Union's reasons for requesting the information, set forth above, establish that the documents sought were essen-

tial, necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of the unit employees. The information all related to unit employees' terms and conditions of employment, the benefits they received, and the policies affecting them. All the requested documents encompassed information that the Union had not requested and had not received prior to its requests.

As set forth above, I have found that no valid impasse has occurred. Even assuming, however, that impasse took place, an employer has an obligation to furnish information in order to enable the union to perform its duties as the collective-bargaining representative of the unit employees. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–437 (1967). The Board has held that because an impasse is viewed as "only a temporary deadlock or hiatus" in bargaining, the bargaining process contemplates that with the passage of time following such a hiatus, positions will be modified and bargaining will be resumed. During such a hiatus, an employer has a duty to supply relevant information. Accordingly, it has been held that an employer cannot justify its refusal to provide relevant information because the request was made after impasse. *Watkins Contracting, Inc*., 335 NLRB 222, 225 (2001). Regardless of whether the parties reached impasse, the Union remained the bargaining agent for the unit and was presumptively entitled to information concerning unit employees that it needed to fulfill its representative duties.

In *Caldwell Mfg. Co.,* 346 NLRB 1159, 1160 (2006), the Board set out the relevant law:

> An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations. Generally, information pertaining to employees within the bargaining unit is presumptively relevant. . . . The burden to show relevance is not "exceptionally heavy," and "the Board uses a broad, discovery-type of standard in determining relevance in information requests."

The Respondent's defenses are that it provided information to prior Union bargainers who said that no further information was needed, the Union had not sought any additional information prior to January 19 but nevertheless had made two full economic proposals without such information, and that the information requested had already been provided. None of these defenses have merit. The fact that prior Union agents were satisfied with the information they received does not mean that later information could not be requested. The bargaining progressed and the ownership changed after Alcoff became the chief negotiator and he correctly believed that additional information was necessary. Similarly, the fact that prior economic proposals were made without such information does not mean that the Union could not benefit from additional information which it could utilize to make an additional proposal. Finally, the evidence is clear that none of the requested information had been furnished.

I accordingly find that the information requested in the letters of January 19, June 20 and July 17, 2006, all of which was presumptively relevant in that it pertained to the unit employees, was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of the unit employees. The Respondent's failure to furnish the information requested violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The following employees constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time certified nurses assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

2. At all times material herein the Union has been the exclusive collective-bargaining representative of the employees in the above unit.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by prematurely declaring impasse and unilaterally implementing certain changes in its employees terms and conditions of employment when the parties were not at a valid, good-faith impasse in bargaining.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the access right of Union representatives to its facility.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the health insurance plan that covered unit employees' health expenses.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the Baylor Incentive Program.

7. The Respondent violated Section 8(a)(5) and Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with its employees by making a contract proposal to them before the proposal was made to the Union.

8. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates it had proposed to bargain and by unreasonably failing and refusing to meet on certain dates for bargaining.

9. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to supply information requested by the Union in its letters of January 19, 2006 and June 20, 2006 and July 17, 2006, which was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of the unit employees.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, inasmuch as I have found that no legally valid impasse in bargaining has been reached, I recommend that the Respondent be ordered to rescind the unilateral changes it made on or after August

24, 2005, but nothing in the Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union. I shall order the Respondent to make whole the unit employees for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Atrium at Princeton, LLC d/b/a Pavilions at Forrestal and Princeton Healthcare LLC d/b/a Pavilions at Forrestal, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith over the terms and conditions of a successor collective-bargaining agreement with SEIU 1199 New Jersey Health Care Union as the exclusive bargaining representative of the employees in the following unit:

> All full-time and part-time certified nurses assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

(b) Prematurely declaring impasse and unilaterally implementing certain changes in its employees' terms and conditions of employment when the parties were not at a valid, good-faith impasse in bargaining.

(c) Unilaterally changing the access right of Union representatives to its facility.

(d) Unilaterally changing the health insurance plan that covered unit employees' health expenses.

(e) Unilaterally eliminating the Baylor Incentive Program.

(f) Failing and refusing to bargain with the Union over a successor collective-bargaining agreement by engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates it had proposed to bargain and by unreasonably failing and refusing to meet on certain dates for bargaining.

(g) Bypassing the Union and dealing directly with its employees by making a contract proposal to them before the proposal was made to the Union.

(h) Failing and refusing to supply information requested by the Union in its letters of January 19, 2006, June 20, 2006 and July 17, 2006, which was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of the unit employees

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and part-time certified nurses assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

(b) On request, cancel and rescind all terms and conditions of employment which it unlawfully implemented or unlawfully eliminated on and after August 24, 2005, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union.

(c) At the Union's request, restore to unit employees the terms and conditions of employment that were applicable prior to August 24, 2005, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining.

(d) Make whole the unit employees for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, on and after August 24, 2005, plus interest.

(e) Furnish to the Union in a timely manner the information requested in the Union's letters dated January 19, 2006, June 20, 2006 and July 17, 2006.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Wayne, New Jersey, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecu-

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2005.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 15, 2008.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to bargain in good faith over the terms and conditions of a successor collective-bargaining agreement with SEIU 1199 New Jersey Health Care Union as the exclusive bargaining representative of the employees in the following unit:

> All full-time and part-time certified nurses assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

WE WILL NOT prematurely declare impasse and unilaterally implement certain changes in your terms and conditions of employment when we have not reached a valid, good-faith impasse in bargaining.

WE WILL NOT unilaterally change the access right of Union representatives to our facility.

WE WILL NOT unilaterally change the health insurance plan that covered your health expenses.

WE WILL NOT unilaterally eliminate the Baylor Incentive Program.

WE WILL NOT fail and refuse to bargain with the Union over a successor collective-bargaining agreement by engaging in delaying tactics, ignoring the Union's requests to meet on numerous dates it had proposed to bargain and by unreasonably failing and refusing to meet on certain dates for bargaining.

WE WILL NOT bypass the Union and deal directly with you by making a contract proposal to you before the proposal was made to the Union.

WE WILL NOT fail and refuse to supply information requested by the Union in its letters of January 19, 2006, June 20, 2006 and July 17, 2006, which was necessary for and relevant to the performance of the Union's duties as your exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights you are guaranteed by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and part-time certified nurses assistants, housekeeping employees, dietary employees, laundry employees, staff licensed practical nurses, unit clerks, unit secretaries, activities/recreations employees, maintenance employees employed at the Pavilions, but excluding registered nurses, office clerical employees, supervisors, watchmen and guards.

WE WILL on request, cancel and rescind all terms and conditions of employment which we unlawfully implemented or unlawfully eliminated on and after August 24, 2005, but WE WILL NOT be required to cancel any unilateral changes that benefited you without a request from the Union.

WE WILL at the Union's request, restore to you the terms and conditions of employment that were applicable prior to August 24, 2005, and continue them in effect until we and the Union either reach an agreement or a good-faith impasse in bargaining, and make you whole for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, on and after August 24, 2005, plus interest.

WE WILL furnish to the Union in a timely manner the information requested in the Union's letters dated January 19, 2006 and June 20, 2006 and July 17, 2006.

ATRIUM AT PRINCETON, LLC D/B/A PAVILIONS AT FORRESTAL AND PRINCETON HEALTHCARE, LLC D/B/A PAVILIONS AT FORRESTAL